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DOMINICK GAGLIARDI,)
Appellant,)
v.)
HARFY ABRAHAMS,)
Appellee.)

PHILIP ABRAMS, Conservator)
of the estate of Harry)
Abrahams, incompetent,)
Appellee,)
v.)
DOMINICK GAGLIARDI,)
Appellant.)

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

349 I.A. 160

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION
OF THE COURT.

This is an appeal from the Municipal Court of Chicago
in two cases that were consolidated by agreement of the parties
in the trial court and on motion the appeals were consolidated
in this court. The facts involved and the evidence
are the same.

For the purpose of clarity in this opinion the
appellant in each case, Dominick Gagliardi, will be referred
to as plaintiff and Harry Abrahams on whose behalf
Philip Abrams, conservator of the estate of Harry Abrahams,
incompetent, acted, will be referred to as the defendant.

In the first case Dominick Gagliardi obtained
judgment by confession on a note against Harry Abrahams.
This was subsequently opened on motion of Philip Abrams,
the conservator. On the trial there was a finding for the
defendant.



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In the second case, Philip Abrams as conservator of the estate of Harry Abrahams, incompetent, sued Dominick Gagliardi to recover the sum of \$1600 paid by Harry Abrahams as a part deposit on the purchase of a store from Dominick Gagliardi. On the trial there was a finding for the plaintiff.

The principal issue that we must determine is whether or not defendant was incompetent at the time he entered into the contract with plaintiff which caused the controversies in question. The determination of this question necessitates a summary of the evidence.

Plaintiff, who was in the poultry business, became acquainted with defendant shortly prior to the date of the transaction in question when defendant purchased two stores from him. On August 17, 1950, the defendant agreed to purchase a third store from the plaintiff. The contract was prepared by a lawyer who had been a friend of the plaintiff for four years but had not known the defendant. The defendant was alone and not represented by an attorney. The lawyer's fee was to be collected from the plaintiff. Under the terms of the contract, the defendant agreed to pay the sum of \$10,000, payable \$3,000 in cash, and the balance of \$7,000 on or before the end of August. The \$3,000 was paid by defendant's check drawn on the Chicago City Bank. It was presented for payment by the plaintiff and returned marked "Not sufficient funds." Thereafter, plaintiff and defendant went to the bank and according to plaintiff, defendant advised him to leave the check for collection.

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On September 6, 1950, plaintiff and defendant again went to the bank and defendant turned over to the plaintiff the sum of \$1600, the deposit in question, to apply on account of the check and executed the note in question for \$1400. At that time plaintiff agreed to extend the closing date of the deal for 30 days.

Dr. Louis B. Boshes, a physician specializing in neurology and psychiatry, and a member of the staff of Cook County Hospital, Michael Reese Hospital and of the faculty of the Northwestern University School of Medicine, stated that he first examined the defendant on October 24, 1950, and that he had treated and examined him from time to time between that date and up to the time of the trial. It was his opinion that defendant was mentally ill and that his nervous system had shown a progressive deterioration which had existed for months previous to the date of his initial examination. He stated that he did not believe that the defendant had the mental capacity "to transact a business involving the sale of or the purchase of a store and the handling of a substantial amount of money running into the thousands." On cross-examination he testified that with the amount of organic involvement that defendant had it was rather unlikely that on August 17, 1950, he would be capable of conducting business, but that it was not impossible because "in medicine it is never impossible."

The conservator stated that he had met the plaintiff on several occasions and that shortly prior to the date of

the contract in question the plaintiff discussed with him defendant's desire to purchase a third store. He said that plaintiff told him defendant was "nuts" and he would be ruined if he didn't get out of the second store that he bought. He asked plaintiff about the proposed purchase of the third store and plaintiff said he wouldn't sell it to him because he was crazy. A few days later he had a phone conversation with plaintiff and he again repeated he would not sell the defendant the third store. He again saw plaintiff after the contract had been entered into, when he went with defendant to get the deposit back and to try to get plaintiff to cancel the note. At that time plaintiff stated that he could not give back the \$1600 but that he could forget the note which would be torn up.

The fact that a conservator was not appointed for defendant until February 6, 1951, does not ipso facto establish that defendant was not incompetent prior to that date. It did place on defendant the burden of establishing that he was incompetent when he entered into the agreement.

It is apparent from the medical testimony, which was not contradicted by the plaintiff, and from the conversation of the conservator with the plaintiff, which was not denied, that defendant did not have the mental capacity to conduct the transaction in question on August 17, 1950. It is the duty of the courts to protect those who are incompetent from the consequences of their acts and this will be done whether there is an adjudication of incompetency or not. Ronan v.

Bluhm, 173 Ill. 277; Fecht v. Freeman, 251 Ill. 84; Jordan v. Kirkpatrick, 251 Ill. 116.

Further, this case was tried by the court without a jury. The trial court heard and saw the witnesses who testified and this court will not substitute its judgment as to the credibility of witnesses for that of the trial court which saw and heard them, unless the findings are manifestly against the weight of the evidence, which they were not. Wynekoop v. Wynekoop, 407 Ill. 219.

The judgment entered in each of the cases by the trial court was proper and they are affirmed.

Judgments affirmed.

Schwartz and Tucky, JJ., concur.

March 1, 1900. The following is a list of the names of the persons who have been elected to the office of the

President of the United States for the year 1900.

William McKinley, President of the United States for the year 1900.

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MORRIS OHNSTEIN,
Plaintiff,

v.

SIMON L. LEVY, et al,
Defendants.

SIMON L. LEVY,
Counter-plaintiff,
Appellant,

v.

ARLENE MEYER and HAROLD MEYER,
Counter-defendants,
Appellees.

INTERLOCUTORY APPEAL
FROM CIRCUIT COURT
OF COOK COUNTY.

349 I.A. 161'

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION
OF THE COURT.

It would appear, although somewhat nebulously from the brief and abstract filed in this case, that this suit involves a dispute over the ownership and control of an apartment building. Upon the petition filed by Arlene Meyer and Harold C. Meyer, two of the litigants, it was charged that the court had given permission to Arlene Meyer to rent one of the apartments, and that appellant had interfered by putting a padlock on the apartment to be rented. The petition sought to hold appellant in contempt. On the hearing, the court entered an order from which this appeal was taken. This order purged appellant of contempt, but nevertheless restrained him from interfering with the prospective new tenants' quiet enjoyment of the premises. There is nothing in the petition to support the order entered. No brief has been filed by appellees. It may well be

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that there are other facts in the record which would lend support to the order restraining appellant, but they do not appear, as appellees have not seen fit to present their side to the court.

The order will be reversed and the cause remanded, with directions to eliminate that portion of the order enjoining appellant Levy.

Order reversed and cause remanded
with directions.

Robson, P.J., and Tuohy, J. concur.

45849

ESTELLE M. WINKENWERDER,)
Appellant)
v.)
RAYMOND W. WINKENWERDER,)
Appellee)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

349 I.A. 161²

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the Circuit Court of Cook County reducing an alimony and child support allowance from \$100 to \$80 a week after a hearing, on the ground that defendant's income had decreased during the current year.

Plaintiff contends that the uncontradicted evidence shows that the income of the defendant increased during the current year and that the trial court abused his discretion in granting a reduction in alimony and child support and in refusing plaintiff's counterpetition for an increase in alimony and child support.

In January of 1946 the decree of divorce was awarded on plaintiff's complaint which provided that plaintiff should be entitled to the custody of the minor child of the parties and that defendant should pay plaintiff \$30 a week alimony and \$30 a week child support. By successive orders over the years the alimony and support money was increased, the last on January 31, 1951, fixing alimony at \$57.50 and child support at \$42.50 per week. The modification of this order, reducing alimony payment to \$46 and child support to \$34 per week and denying plaintiff's counterpetition, is the order appealed from.

The evidence shows that defendant is president of Ray

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Motors, Inc., active in the business, and owns two-thirds of the stock of said company. He testified that in 1951 and for some time prior thereto his salary was \$1800 a month until September of that year, when by virtue of decreased sales his salary was reduced to \$1000 a month. In addition to the salary he received income from realty and other sources. He owns a three-flat building in Chicago which he has offered for sale at \$25,000, one apartment in which he is keeping vacant to facilitate the sale. He owns a six-flat building at 6233 Greenwood Avenue, Chicago, which he is converting into a rooming house at a cost of approximately \$30,000. He paid \$30,000 for the building, which he acquired on April 1, 1951, and at the time of the hearing had had no net income from it. However, he had forty tenants who were paying an average of \$10 a week, and expected within a month that his income would approximate \$1500 a month. In August he sold forty shares of his stock in the company to the company for \$12,000, retaining 120 shares, and since September of 1951 borrowed \$7500 from the company. At the same time the only other stockholder turned back to the company a similar percentage of his stock, so that after this transaction defendant's ownership and control of the company remained the same as before. Defendant was the only witness in his behalf.

Plaintiff testified in her own behalf that during this year her expenses have increased to a very considerable extent by virtue of the illness of the eight year old son of the couple, who for some time has suffered from asthma; that this disease necessitated moving away from the vicinity of Lake Michigan where her rent was \$55 a month, to an unfurnished

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apartment in Naperville, Illinois, for which she paid \$100 a month; that in order to obtain the apartment she had to buy furniture at a cost of \$2,250; that defendant loaned her the money and took a chattel mortgage back upon which she pays to him \$62.50 a month out of her alimony and support money. She has also become obligated to pay \$137 for medical services which she contends defendant is obligated to pay under the modification order requiring him to meet unusual medical expenses.

On behalf of plaintiff, Edmond Apcel, a certified public accountant, testified that in reporting his income from the company which he controlled, defendant reported \$11,000 but should have reported \$23,000. The discrepancy involved a \$12,000 item which defendant maintains was a capital gain, whereas the accountant interpreted it as a disguised dividend. If this item be treated as income for the purpose of fixing the alimony allowance, the gross income for defendant for 1951, according to witness, would be \$31,000 as against \$24,000 at the time of the entry of the original order. Furthermore, the plaintiff filed a sworn answer and counterpetition in both of which she alleged that the defendant's sworn testimony which preceded the last prior order was that he was then earning \$18,000 a year. The trial court was of the opinion that the \$12,000 was not income, although he recognized that it might eventually be so held by the Bureau of Internal Revenue.

We are of the opinion that whether the \$12,000 be held taxable income or otherwise is irrelevant. The undisputed fact is that defendant caused a company of which he owned two-thirds of the common stock to reduce his salary from \$1800 to \$1000 a month during the year and to pay him \$12,000 in

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cash for which he turned in some shares of stock. So far as the rights of his wife and minor child are concerned this should be considered as income on a hearing held for the purpose of determining whether there has been a change in the financial condition of the defendant. He received this \$12,000 in cash to use as he saw fit, regardless of what tax situation may thereby be created. The measure of the amount of alimony and child support a man is required to pay is measured by the needs of the wife with relation to her husband's ability to pay. Herrick v. Herrick, 319 Ill. 146; Gilbert v. Gilbert, 305 Ill. 216. The evidence here clearly established increased income of the husband, nothing as to his expenses, and increased expenses for the wife, and it was error on this record to decrease the plaintiff's alimony and child support allowance. Moreover plaintiff was entitled to a hearing on her counterpetition, in view of the changed financial circumstances of the parties, as to the amount of increase she should be awarded for alimony, child support and medical fees.

The order of the Circuit Court of Cook County is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED

Robson, P.J., and Schwartz, J., concur.

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45873

EVA FORDEN,

Appellee,

v.

ROSE COPILOVE,

Appellant.

)
) APPEAL FROM SUPERIOR COURT,
)
) COOK COUNTY.
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349 I.A. 162

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought her action against defendant for damages for personal injuries sustained in a fall in an apartment building owned, managed and operated by defendant at 6021 Harper avenue, Chicago, Illinois, allegedly as the result of negligent maintenance of the building. From a judgment on a jury's verdict in the sum of \$5,000 defendant appeals.

The sole point raised by defendant is that plaintiff was guilty of contributory negligence as a matter of law and that defendant was guilty of no negligence which contributed to the plaintiff's injury.

There is evidence in the case tending to prove the following facts: Plaintiff had gone to the apartment building to visit one Mrs. Lidd, who lived on the first floor. Prior to the accident she had been in Mrs. Lidd's apartment twice. She had been in the building on a number of prior occasions to visit her friend Mrs. Erickson, Mrs. Lidd's mother, who lived on the third floor of the building. Entrance to the apartment building is had through an outer door which leads into a small vestibule where the mailboxes and apartment designations are contained,

and thence through a second door into a foyer off of which are the first floor apartments and also an open stairway leading to the apartments on the floors above. Closely adjacent to the door leading into Mrs. Lidd's apartment is another door, of similar size and appearance, which opens upon a basement stairway. The door to this stairway pulls outward and the descent commences immediately at the doorway. It appears from the uncontradicted testimony that plaintiff opened the unlocked door leading to the stairway, mistaking it for the entrance to Mrs. Lidd's apartment. The areaway into which she stepped was unlighted and she fell down the stairs, sustaining injuries the extent of which is not disputed.

Defendant urges that by stepping into the dark areaway plaintiff was guilty of contributory negligence as a matter of law and relies upon a number of cases, of which Van Ness v. Murphy, 107 N.Y.S. 99, is typical. These cases reiterate the rule that darkness serves as a natural warning of danger and that one who enters upon strange premises without investigation proceeds at his peril. We are of the opinion, however, that the facts in the instant case serve to distinguish it from this line of authority. Here there were two doors side by side, deceptively similar, the one leading to safety and the other placing the plaintiff in immediate danger. The plaintiff here did not proceed in darkness for any appreciable distance, due to the fact that her precipitous descent commenced at the doorway. The fact that the plaintiff had been in the apartment on two other

occasions, while a circumstance tending to establish familiarity with the premises, does not in our opinion change the question of negligence from one of fact to one of law. The trial judge, in a written statement of his reasons for overruling defendant's motion for a new trial, found that the doors to the basement and to the front apartment were closely adjacent and that plaintiff was ignorant of the existence of the basement door at that location; that she had been invited upon the premises and that under all the circumstances the question of negligence was for the jury. We are of the opinion that the case comes closely within the facts of View v. Metropolitan W. S. Elev. Ry. Co., 166 Ill. App. 154, and Gilberto v. Yellow Cab Co., 177 F.2d 237. In the latter case the court said (p. 239):

"The main argument of defendant is that plaintiff was negligent in opening the door into a dark hallway or passageway and proceeding to enter. We do not think that any negligence can be attributed to plaintiff from the fact that she opened the door under the circumstances here related. If there was negligence on her part, it must reside in the fact that when she opened the door and discovered the darkness inside, the exercise of proper precaution for her own safety would have caused her to halt in her forward advancement at a point prior to the first step of the stairway. * * *

"* * * The reasonable inference from the situation is that plaintiff when the door opened, with one hand on the knob placed one foot in the doorway, and that the next step or advancement of the other foot took her to the first step of the stairway and she fell. * * *

"* * * we think the question of contributory negligence was one for the jury * * *."

The rule is well settled in this State that the question of contributory negligence becomes one of law only when the undisputed evidence is so conclusive that it is clearly seen

that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precaution. Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the question of contributory negligence is for the jury. Mueller v. Phelps, 252 Ill. 630, 634.

Moreover we are of the opinion that maintaining, side by side in a dimly lighted room, two doors of similar size and general appearance, one of which leads to an apartment and the other to a place of danger, the second door being unlocked, the stairway unlighted, and without sign or warning of any kind to an invitee, raises a question of fact as to the negligence of the landlord, and we see no reason to interfere with the judgment entered on the jury's verdict in this case.

The judgment of the Superior Court of Cook County is affirmed.

Judgment affirmed.

Robson, P.J., and Schwartz, J., concur.

1. 中国历史地理学的发展概况

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Gen. No. 10622

Agenda No. 20.

In The
APPELLATE COURT OF ILLINOIS
Second District
October Term A.D. 1952.

349 I.A. 241¹

Wanda Swift,
Plaintiff-Appellee
vs.
Junior Swift,
Defendant-Appellant,

APPEAL FROM THE
CIRCUIT COURT OF
WINNEBAGO COUNTY.

Dove, P.J.

From a decree granting the plaintiff a divorce from the defendant on the ground of extreme and repeated cruelty and dismissing for want of equity, defendant's counterclaim for divorce on the ground of adultery, the record is brought by the defendant to this court for review.

The record discloses that the parties were married on December 28, 1948 and have two children, a daughter and a son. The plaintiff testified that on two occasions while she was pregnant her husband, while angry, slapped her with his hand striking her on the cheek each time and causing her severe pain. She further testified that again, on September 18, 1951, the defendant struck her on the head with his fist causing her nose to bleed and resulting

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UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA

VS.

DECEMBER TERM, 1907.

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APPEAL FROM THE
CIRCUIT COURT OF
THE DISTRICT OF COLUMBIA

WILLIAM H. HARRIS,
PLAINTIFF,
VS.
JUNIOR HARRIS,
DEFENDANT.

Case, No. 1.

That a decree granting the plaintiff a divorce
from the defendant on the ground of extreme and repeated
cruelty and beating, for lack of equity, and for the
non-support, for failure to provide a suitable maintenance,
is the right of the plaintiff in this case for
review.

The facts disclosed that the parties were married
on December 10, 1903 and have two children, a daughter
and a son. The plaintiff testified that on two occasions
while she was pregnant her husband, while angry, hit her
with his hand, striking her on the back each time
and causing her great pain. She further testified that
on December 10, 1904, the defendant turned her on
the head with his fist causing her nose to bleed and resulting

in severe headaches and that again on October 11, 1951, while they were sitting at the dining room table eating supper and while she was feeding the baby he became angry pulled her out of her chair and dragged her from the table to the front room and later on, the same evening, "threw me out the back door and locked me out. I finally got back in and he left. I was black and blue from head to toe all over my body." The defendant testified that upon this occasion he "struck his wife on the side of the jaw. I hit her with the back of my hand, and it wasn't with my fist. I did not lock her out of the house. I put her out the back door and I left her out there five minutes."

The defendant also testified that upon one of the other occasions, ^{testified to by appellee} ~~that~~ he did slap his wife "on the side of her head to make her quit shaking the baby up and down on the bed." Upon the other occasion at which time the plaintiff testified that the defendant had slapped her, the defendant denied that he had struck her and his version of what occurred as abstracted is: "I went to the kitchen to get something to eat. When I opened one cupboard the beans and pans fell out and it got me mad, so I started cleaning the cupboard and probably cussed a few times at her."

Jackie Porter corroborated the plaintiff as to the occurrences of September 19, 1951 and October 11, 1951, her testimony being to the effect that in response to a call from the plaintiff this witness went to the home of the plaintiff on September 19, 1951, and found her crying and her nose bleeding as a result of defendant's conduct and on October 11, 1951, this witness again observed black

and blue bruises on the face, back and neck of the plaintiff as a result of defendant's conduct.

Counsel for appellant insists that the evidence in this case is insufficient to sustain the decree. We are unable to agree with this contention. The testimony of the plaintiff, corroborated by the evidence of Jackie Porter, when considered in the light of the evidence of the defendant sustains the conclusion arrived at by the Chancellor.

Counsel for appellant also insist that the evidence offered on behalf of appellant's counterclaim reasonably leads to the conclusion that appellee was guilty of adultery with Eldon Ring, and therefore the court erred in dismissing the counterclaim. The only evidence offered in support of the allegations of the counterclaim is a letter dated November 5, 1951, written by Eldon Ring and directed to appellee and the testimony of Alice Swift, the wife of a brother of appellant who testified that appellee told her that Eldon Ring had come into the room where she was sleeping at three o'clock in the morning sometime in the year 1949 and had kissed her. Appellee denied that she had ever made any such statement and denied that any such thing had ever occurred. We are inclined to agree with counsel for appellee that there is nothing in this letter which would lead to the conclusion that appellee was guilty of adultery. It does appear that the parties hereto and Eldon Ring were friends and had been since 1946: that appellant and Ring were employed at the same place and for two or three weeks, Ring, shortly after his wife procured a divorce from him in 1946 had a room and boarded with appellant and appellee and all of them frequently attended dances

and blue bruise on the face, back and neck of the victim
first as a result of defendant's conduct.

On the first day of the trial, the evidence
in this case is insufficient to establish the defendant's
guilt beyond a reasonable doubt. The testimony
of the witness, contrary to the evidence of the
other, was not based on the facts of the witness of
the defendant's conduct, but on a statement made by the
defendant.

On the second day of the trial, the evidence
showed that on the first of defendant's conduct
the defendant's conduct was not based on the facts of the
defendant's conduct, but on a statement made by the
defendant. The only evidence offered
in support of the defendant's conduct is a
letter dated November 8, 1951, written by the defendant and
addressed to the defendant and the testimony of the witness,
the wife of a brother of the defendant, who testified that she
had told her that the defendant had come into the room where
she was sleeping at 11:00 o'clock in the morning and that
in the year 1949 and had sexual intercourse with her. The
defendant denied any such statement and denied that any
such thing had ever occurred. The wife declined to agree with
the defendant's testimony that there is nothing in this letter
which would lead to the conclusion that the defendant was guilty
of adultery. It was stated that the witness had not and
the wife was friendly and had been since 1948; that the wife
and the defendant were engaged at the same time and for the
or three years, and, shortly after she was proposed a
divorce from him in 1948 and a second time married with the wife
and the defendant and all of them were present at the same time.

together. Mr. Ring, was a witness at the hearing before the Chancellor and from a consideration of all evidence in this record we are unable to say that the manifest weight of the evidence supported appellant's charge of adultery.

The decree of the Chancellor is sustained by the evidence and that decree will be affirmed.

Decree affirmed.

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in this regard we are unable to say that the ...
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In the Matter of the Estate of
MARIA MEYER, Incompetent,

LA SALLE NATIONAL BANK, Conserva-
tor of the Estate of MARIA
MEYER, Incompetent,

Appellee,

v.

RUTH B. RANSOM,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

349 I.A. 241²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On September 21, 1951 the Probate Court of Cook County approved the first current report and account of the conservator of the estate of Maria Meyer, incompetent, from which the defendant, Ruth B. Ransom, took an appeal to the Superior Court of Cook County where a hearing was had de novo, pursuant to which a decree was entered likewise approving the report and account. Defendant appeals from that decree.

It appears that on January 23, 1950 the La Salle National Bank was appointed conservator for the estate of the incompetent, and thereafter Nicholson and Nisen were retained as its attorneys. The estate consisted of cash, securities and some income-producing farms in Kansas. On October 2, 1950 a family-settlement agreement (hereinafter referred to as the agreement) was executed by all parties in interest and approved by the Probate Court. The conservator's account for the period up to May 18, 1951 shows a deficiency in the income account on that date of \$7370.39. The controversy revolves primarily around the interpretation

of Paragraph 7 of the agreement which segregates the income from the Kansas farms after January 1, 1951 from other income of the estate. Under the provisions of the agreement John J. Meyer, one of the appellees, is upon the death of the ward Maria Meyer, to become the recipient of her estate, with the exception of the balance remaining in the account of income received from the Kansas farms after December 31, 1950 which is to go to the defendant Ruth B. Ransom and Elvira J. Huyck; this represents the interest of defendant and Elvira J. Huyck in the estate.

Defendant contends that the conservator's report and account should be modified so as to eliminate the deficiency of \$7370.39 shown as of May 18, 1951 and that the conservator be required to strike a balance on the account as of December 31, 1950 and to show all costs, expenses and support of the ward as having been paid in full from both principal and income up to and including December 31, 1950. Her counsel say that the agreement should be interpreted to bring about this result. However, since, as we think, the agreement is clear and unambiguous, it cannot be construed contrary to its terms. (Hancock v. Knights of Security, 303 Ill. 66.)

Paragraph 7 clearly contemplates that cost and expenses of administration of the ward's estate and the cost of the care, maintenance and support of the incompetent are to be treated as charges against income, not principal. There is nothing in that paragraph about charging principal

with any such expenses for any period or under any circumstances. The agreement provides, without reference as to when such costs are incurred, that if they "shall exceed or require funds in excess of the total income of said incompetent's estate other than the net income from the said Kansas Farms segregated as aforesaid, then the conservator is authorized and directed to withdraw and use any and all funds in the segregated account of income derived from the Kansas Farms ***." Thus the tenor of Paragraph 7 is to make paramount the proper care and comfort of the ward throughout the entire period of the administration of the estate, whether it be before or after January 1, 1951. The beginning of Paragraph 7 recites that the incompetent already had a life estate in the Kansas Farms and, being thereby entitled to the entire income therefrom for the rest of her life, it is not susceptible of an interpretation showing an intent that she should give up some part of that income to defendant^{and} Elvira J. Huyck at the expense of the principal; and there is no express provision to that effect. Obviously the purpose of the provision for segregation was to establish two classes of income and to give the segregated farm income preferential status so that if there was any income left after caring for the ward and paying administration expenses during the entire period of administration, then such income would go to defendant and Elvira J. Huyck. To the extent that, at any time, it should become necessary to dip into principal to pay current expenses, as it did in this case,

the principal was entitled to be restored out of subsequent income as far as possible, prior to termination of the conservatorship.

The agreement was approved in the Probate Court, and thereafter on November 10, 1950 the court ordered that fees of \$3000.00 to the conservator and \$4000.00 to its attorneys, or an aggregate of \$7000.00, be paid on account "out of the trust funds" in the hands of the conservator, for services rendered to October 14, 1951, and "that such sums be treated by the Conservator herein as costs of administration herein and charged against income heretofore and hereafter accruing to this estate." All interested parties had due notice of the hearings ^{at} which fees were allowed, and participated therein. There were accordingly final appealable orders for the payment of money out of the fund. People v. Illinois State Bank of Crete, 312 Ill. 613. Defendant interposed no objection to the entry of the orders of October 20 and November 10, 1950 in the Probate Court, nor to the fees allowed in either the Probate or the Superior courts, and no appeal was taken from any of said orders. Moreover, no record has been preserved from which we could review the facts which motivated the Probate and Superior courts in finding the fees to be fair, reasonable and proper. Consequently, the allowance of these fees to the conservator and its attorneys cannot be here considered.

The only objection to fees, as set forth in defendant's answer to the report and account of the conservator, pertains to the amounts of \$175.00 allowed to

the office of the Secretary of the
Board of Education, New York City, New York
February 1, 1900.

The enclosed was forwarded to the
Board of Education on January 24, 1900, for their consideration.

Very truly yours,
John D. McDonald, Secretary of the Board of Education,
New York City, New York.

Enclosed for the Board of Education are
two copies of the report of the Committee on
the Proposed Amendment to the Constitution of the State of New York,
relating to the election of judges of the Court of Appeals.

The report was adopted by the Board of Education on January 24, 1900, and
forwarded to the Board of Regents for their consideration.

Very truly yours,
John D. McDonald, Secretary of the Board of Education,
New York City, New York.

Enclosed for the Board of Regents are
two copies of the report of the Committee on
the Proposed Amendment to the Constitution of the State of New York,
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the Proposed Amendment to the Constitution of the State of New York,
relating to the election of judges of the Court of Appeals.

the conservator, and \$425 allowed to its attorneys for services over the period from October 14, 1950 to May 18, 1951. That objection was allowed in part, and the attorneys' fees were reduced to \$200.00 by the last paragraph of the order of the Probate Court entered September 21, 1951 approving the account, and reflected in Paragraph 4 of the decree of December 7, 1951 of the Superior Court. No record is preserved from which we could review the propriety of these orders.

The remaining item in controversy relates to the amount of \$640.21 which was credited to the principal account in the conservator's report. Although defendant makes the point that it should have been credited to the income account, she presents no argument, either of facts or of law, to support her contention, and therefore, under Rule 7 of the Appellate Court rules in this district, this point "may be considered waived" and will not be entertained.

The decree of the Superior Court approving the first current report and account of the conservator showing a deficiency in the income account of \$7370.39 on May 18, 1951, should therefore be affirmed, and it is so ordered.

DECREE AFFIRMED.

NIEMEYER, J., and BURKE, J., Concur.

123

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45834

CHICAGO MACARONI COMPANY, INC.,
a corporation,

Appellant,

v.

ANTHONY V. MONARDO and BENNIE
MONARDO, trading as MONARDO
BROTHERS,

Appellees.

APPEAL FROM

MUNICIPAL COURT

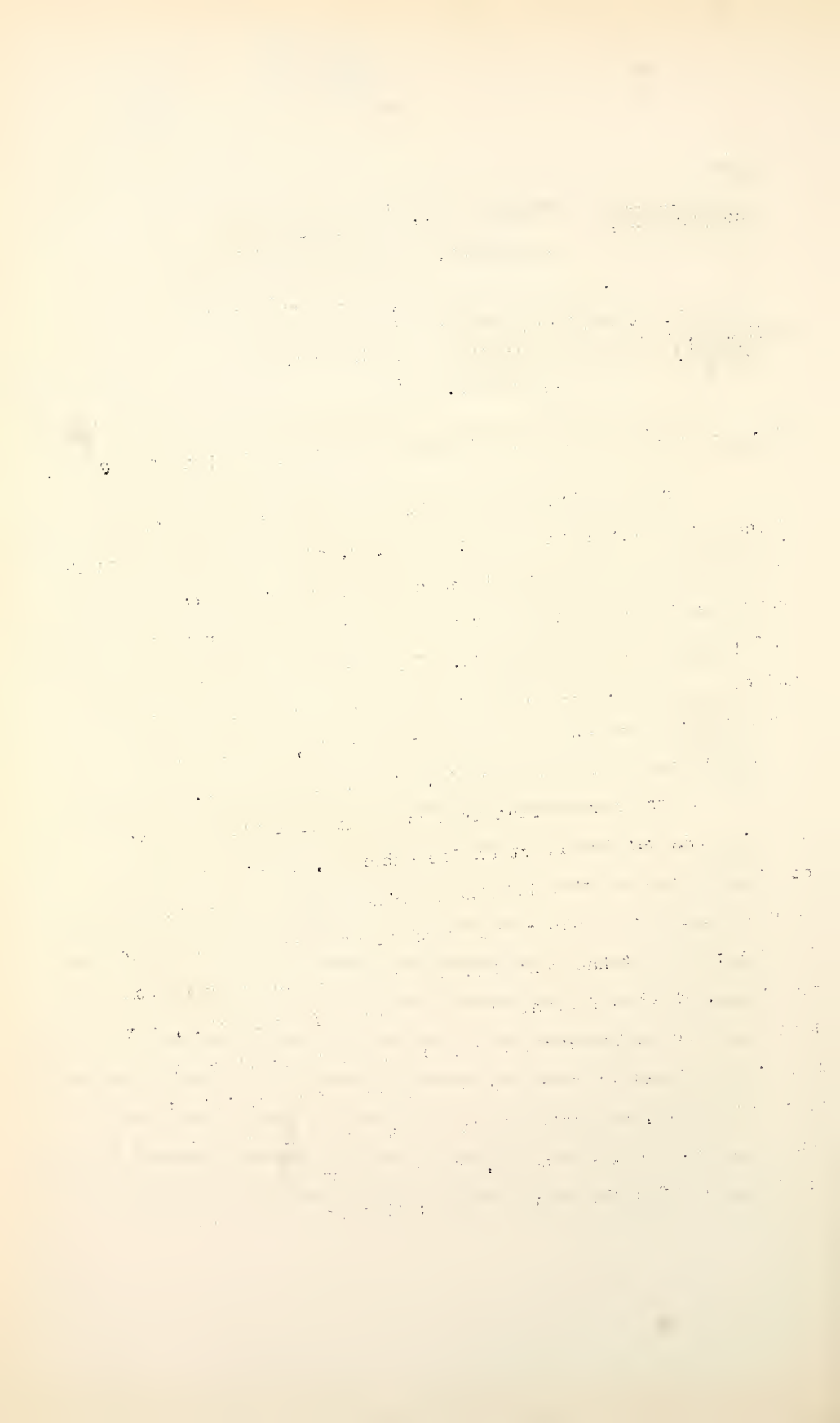
OF CHICAGO

349 I.A. 242

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago to recover the sum of \$1400.00, alleged to be due it from defendants as balance of the purchase price of 400 cases of Contadina tomato paste delivered to defendants by plaintiff in September and October 1946. Defendants interposed a defense and counterclaim. Trial by the court resulted in findings against plaintiff on its statement of claim, and against defendants on their counterclaim. Plaintiff appeals.

In its amended statement of claim plaintiff alleged that the OPA was in effect on September 24, 1946; that commissioners were then holding hearings on the price to be charged for the 1946 shipment of tomato paste and similar products; that it had Contadina tomato paste in storage from producers, which defendants were desirous of purchasing, but that the merchandise could not be released as no price had been fixed; that in order to assure defendants of a sufficient amount of tomato paste, plaintiff delivered to them on or about September 26, 1946, 400 cases, which defendants agreed to hold until plaintiff could quote a price; that for the purpose of



inducing plaintiff to comply with their request defendants made an advance deposit of \$3200.00, to be applied upon the purchase price when ascertained; that plaintiff delivered the paste to defendants for the sole purpose of storing it until the price was fixed; that OPA price ceilings were terminated on October 16, 1946; whereupon plaintiff sold and billed defendants for said paste at \$12.00 per case for 200 cases, and \$11.00 per case for the remaining 200 cases, or a total sum of \$4600.00, and credited defendants with the advance deposit of \$3200.00, leaving a balance of \$1400.00, for which it asked judgment.

Defendants' answer averred that on September 24, 1946 there were existing price ceilings on tomato paste which controlled; denied that they requested plaintiff to deliver 400 cases for storage; admitted that they purchased from plaintiff 400 cases at the then existing ceiling price of \$6.50 per case for No. 6 cans, and \$7.35 per case for No. 10 cans, with an agreement that if OPA raised the price, defendants would pay the increased price, and if OPA lowered the price, defendants would be reimbursed for any amount paid over said price; that if OPA took no action, the then existing price prevailing on September 24, 1946 would prevail. The answer admitted that defendants paid \$3200.00 as deposit, subject to price adjustments, as alleged; denied that they received 400 cases for the sole purpose of storage; averred that they sold the paste at retail when received from plaintiff; admitted that OPA was abolished; denied that the paste was sold to them

after OPA was abolished, but averred that it had been sold to them prior thereto, and that the price existing at the time of the purchase on September 24, 1946 was \$6.50 per case for No. 6, and \$7.35 per case for No. 10 cans; averred that plaintiff had delivered to them 200 cases of No. 6 for \$1300.00 and the remaining 200 cases of No. 10 at \$1470.00, making a total of \$2770; and averred that they had paid \$3200.00, which was more than sufficient to satisfy their agreement.

In their counterclaim defendants alleged that on September 24, 1946 the Price Control Act was in full force and effect; that the price of the particular tomato paste was \$6.50 and \$7.35 per case for the respective grades purchased; that it was agreed that if the OPA increased said prices, defendants would pay the difference and, conversely, if the prices were lowered, plaintiff would reimburse defendants for the difference from the sum advanced; that if OPA did not take any action, then existing prices would prevail; that the tomato paste was decontrolled on October 16, 1946; that no order was promulgated by OPA increasing or decreasing the price of tomato paste, and, consequently, there had been no change in price different from that in effect on September 24, 1946; that by reason of the difference between the amount paid by defendants, namely, \$3200.00, and the price of the paste, \$2770.00, defendants were entitled to a refund of \$430.00; and they asked for judgment accordingly on their counterclaim.

In the defense to the counterclaim, plaintiff averred that no price had been set for paste; that the price was to be ascertained at a later date; that when the OPA

was abolished the price for tomato paste was increased by the packers, and plaintiff was charged \$12.00 per case, which was the amount it asked defendants to pay; and plaintiff denied that defendants were entitled to any refund.

The respective theories and contentions of the parties sufficiently appear from the foregoing recital of the pleadings. The question presented is whether they had entered into a contract on September 24, 1946 providing for the sale of 200 cases of the No. 6 can of tomato paste at \$6.50 per case, and 200 cases of the No. 10 can at \$7.35 per case, subject to revision up or down in accordance with ceiling prices to be set by the OPA, the price to remain fixed in the event OPA issued no new ceiling prices or if the agency were abolished. The court found that such a contract had been entered into, and after a careful examination of the record we are satisfied that the finding is in accordance with the manifest weight of the evidence. Paragraph 1 of section 9, chapter 121 1/2, Uniform Sales Act, Illinois Revised Statutes 1951, provides that "the price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed or it may be determined by the course of dealing between the parties." Although there is a conflict in the evidence, the record supports the conclusion that the parties entered into a contract covering all pertinent matters, including the price; it was a definite agreement providing a sliding price scale to be determined by OPA developments. As a matter of fact, the record shows that tomato paste was

decontrolled the latter part of October 1946. Delivery of the merchandise indicated intent to pass title; actual delivery of possession of personal property is usually of itself sufficient evidence of intention to effect a sale thereof. Rosenfeld v. Ehrhart (Abst.), 202 Ill. App. 617. Moreover, the intention of the parties, in the light of existing circumstances, governs the interpretation to be placed on the contract. Forbes v. Hunter, 223 Ill. App. 400. Obviously defendants treated the transaction as a sale since they accepted the merchandise when it was delivered and proceeded to sell it to their customers. It is pertinent to inquire why plaintiff made delivery if it did not intend to pass title. Plaintiff's suggestion that defendants took the merchandise to put in storage is a highly improbable explanation; such a procedure is not in keeping with ordinary trade practices, and defendants, who had two small neighborhood stores, would not be likely to accept 400 cases of canned goods for storage in their limited quarters, especially since plaintiff had a large plant with ample storage facilities--its invoices carry the legend in the upper right-hand corner: "Packers of fruit and vegetables with cannery in California."

Bennie Monardo, one of the defendants, testified that the first complete statement with respect to the transaction was received long after they had disposed of most of the merchandise, making it impossible to return any of it, even if they had been disposed to do so, and that plaintiff

knew that they had sold the larger part of it because it asked defendants to return the unused portion. According to this witness, defendants received the first invoice in November 1946, and he testified that when they objected to it, Samuel Giuffre, plaintiff's sales representative, assured them that the statement meant nothing and told them to "forget about it. After all, you got the paste. You paid us the money. What are you worrying about?" This version of the transaction was subsequently confirmed by Tony Monardo, likewise a defendant. Plaintiff's argument that there was no sale at the time of delivery is not supported by the evidence, but in any event, if there was no sale, all plaintiff could recover was the reasonable value of the goods; but the record is devoid of any proof that would establish a reasonable value. Plaintiff's belated contention that there was an account stated is untenable; it is made for the first time on appeal and should not be entertained.

The case was fairly tried, and although there was a conflict in the testimony of the various witnesses, the trial judge had the opportunity of observing them and concluded that defendants' version of the transaction was the one entitled to credence. Defendants do not seek a reversal of the judgment against them on their counterclaim; accordingly the judgment of the Municipal Court is affirmed in toto.

JUDGMENT AFFIRMED IN TOTO.

NIEMEYER, J., and BURKE, J., Concur.

124 A
APPEAL FROM
CIRCUIT COURT
COOK COUNTY
349 I.A. 243

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

COUNTY
349 I.A. 243¹

Edna Fink filed a complaint in the Circuit Court of Cook County against Benjamin I. Simpson, Rae Simpson, Isaac Gustafson, Pearl Gustafson, Jessie Eisenberg and "Unknown Owners" for a declaratory decree under Section 57-1/2 of the Civil Practice Act, alleging that she is the owner of Lots 8 and 9 in Block 2 in a subdivision in Chicago, fronting on the south side of 67th Street and lying between Crandon Avenue on the west and Oglesby Avenue on the east; that Benjamin I. Simpson and Isaac Gustafson own Lots 1 to 6, both inclusive, in the Block; that the defendants Rae Simpson and Pearl Gustafson are their respective wives; that Jessie Eisenberg is the owner of Lot 7 in the Block; that Lots 1 to 9 occupy the entire width of the block; that Lots 1 to 9, the two corner lots, are 67 feet wide and 150 feet deep; that each of the remaining lots is 30 feet in width by 150 feet in depth; that when the subdivision was laid out in 1892, 67th Street was a residential street designed for one family dwellings; that in order to maintain uniformity of the parkway, a 25 foot building line was drawn on the plat of the subdivision at the time of its recording on October 10, 1892; that the

intervening years have rapidly changed the character of 67th Street, so that today it is partly commercial and partly occupied by "huge multi-dwelling apartment houses," all built up to the sidewalk without any reference to any building restriction line; and that 67th Street is now a car line and the property values thereon "have increased many hundred fold since the subdivision plat was recorded."

Plaintiff further alleges that, in order to put her property to its highest and best use, she consulted an architect for the purpose of erecting a multi-dwelling apartment building thereon; that as the result of surveys made of the property for this purpose she has been informed that the present 25 foot building restriction line substantially decreases the value of her property and its use "for the purpose aforesaid"; that thereupon she inquired of defendants Simpson and Gustafson whether they would join her in an agreement to remove the 67th Street building line, but that they refused and she was informed that the defendant Jessie Eisenberg also refused to permit the building line "to be waived"; that no buildings or improvements whatsoever have been erected on any of the described lots; that the lots remain vacant and unimproved; that no building of any kind consistent with the highest and best use of the property will ever take place on the lots as long as the building line remains; that the building line imposes a perpetual restriction inconsistent and out of character with the present development of the city;

that the present taxable value of the lots, and the taxes assessed against them, make the erection of single family and dwellings a financial impossibility; that an actual controversy exists between plaintiff and defendants. She asked for a declaratory decree that the building line restriction along 67th Street is outmoded, unrealistic and inoperative; that she has a right to erect a multi-dwelling apartment building up to the lot lines on 67th Street on the property owned by her without regard to the building line restriction; and that the defendants, their agents, assigns, heirs, devisees and grantees be perpetually restrained from maintaining any action in any court "based upon the action of the plaintiff in erecting any multi-dwelling apartment building beyond the present 67th Street building line." By an amendment to the complaint she further alleges that the building line constitutes an attempt to create an easement or servitude on the lots; that the "attempt was ineffectual to create such easement or restriction" because (a) the purported owner whose name appears on the plat as "owner" was the Lake Shore and Jackson Park Land Association; that the association was never in title to the real estate and never had any legal right to create any such restriction; and (b) that the restriction, if placed on the property by the actual owner, was insufficient because it can only be imposed by a restrictive covenant in a deed in express words and that the restriction was not imposed by deed.

Jessie Eisenberg, one of the defendants, filed a motion to dismiss the complaint on the ground that it is substantially insufficient in law and contains incompetent, irrelevant and immaterial allegations; that it does not allege that plaintiff was the owner of the property at the time the complaint was filed; that it does not allege that plaintiff or her assignors were billed for or paid any sums for taxes thereon; that her complaint is not supported by an allegation under oath that she is the bona fide owner; that certain paragraphs are insufficient in law and conclusions; that the court has no authority to decide the issue; and that the court has no authority to set aside the building line on 67th Street without setting aside the building line on Crandon and Oglesby Avenues "which are also expressly reserved in the plat covering the property in question." Defendant Eisenberg's motion to dismiss was sustained. Plaintiff elected to stand on her complaint and has appealed.

It has been held in numerous cases that restrictive covenants respecting buildings will not be enforced where the property and neighborhood have, since the making of such agreement, so changed in character and environment, that either the object of the restrictions could not be accomplished by their enforcement or by reason of such change it would be inequitable and oppressive to enforce them. Whether the property and neighborhood have, since the making of the restriction, so changed in character

and environment as to authorize the court to grant relief, depends on the circumstances of each case, Star Brewing Co. v. Primas, 163 Ill. 652; Ewertsen v. Gerstenberg, 186 Ill. 344; and Gilmore v. Keogh, 241 Ill. App. 28. In our opinion plaintiff presents sufficient allegations of ultimate fact as to require an answer. Appellee, in her brief, attempts to go outside the allegations of the complaint in order to sustain her motion. Appellee's motion to strike admits all the facts well pleaded.

Plaintiff alleges that she is the owner of the property. It was unnecessary for plaintiff to allege that she or her assignors were billed for or paid any taxes on the real estate. It was unnecessary for plaintiff to comply with Section 22 of the Civil Practice Act as she is not suing as the assignee and owner of ^anonnegotiable chose in action.

It was error to strike and dismiss the complaint. Therefore, the decree of the Circuit Court of Cook County is reversed and the cause remanded with directions that defendant Eisenberg be ruled to answer the complaint, and for further proceedings not inconsistent with the views expressed.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, P. J., and NIEMEYER, J., Concur.

45882

MARGARET KLIMAS,
Appellee,

v.

BEATRICE KLIMAS, CELIA WIZGIRD,
JOHN DOE and MARY ROE,
Appellants.

}
} APPEAL FROM
}
} MUNICIPAL COURT
}
} OF CHICAGO

125
A
349 I.A. 243²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$1,242.75 entered against her in plaintiff's action for the conversion of government bonds and household goods.

The question presented on appeal is mainly one of fact. The parties are sisters. Prior to the death of their mother in 1943 they lived with her and three brothers in the mother's 9-room flat on south Halsted street. From the early 1930s through the alleged conversion of the property involved herein plaintiff was employed in a clerical position with the Commonwealth Edison Company. During all that time defendant remained at home caring for the mother until 1943 and at all times acting as housekeeper for the other members of the family. At the time of the mother's death or shortly thereafter one brother was in the service, another married and the third brother was put out of the house. The two sisters, parties herein, lived together in the Halsted street flat until 1946, when they moved into a flat on south California avenue owned by another sister and her husband. They occupied this flat until the occurrences involved herein.

The testimony as to the payment for household expenses during the time the parties were living together is conflicting. Defendant testifies that up to the time of the mother's

death the expenses were apportioned among the members of the family. Her brother Joe corroborates her testimony. Defendant further testifies that thereafter the expenses, including the rent for the flat on California avenue, were shared jointly by plaintiff and herself. Plaintiff testifies that she paid a stipulated amount semimonthly and that she knew nothing of the expenses of the household or the rent on California avenue and was not consulted in reference thereto. The brother Joe testified that both plaintiff and defendant talked with him about moving from the 9-room flat on Halsted street to the smaller flat on California avenue and that he advised them to move. In the latter part of 1951 plaintiff was contemplating marriage. On October 15th she moved her belongings to another apartment on California avenue. In November following she brought suit in replevin and trover for government bonds and household goods of the aggregate value of \$3,000. In respect to the bonds involved herein plaintiff alleges in the statement of claims sworn to by her that she is entitled to "\$2,100 face value of U. S. of A. bonds all registered in the name of Margaret Klimas or Beatrice Klimas." This statement is followed by a list of twenty bonds, designated by number and a statement of the face value of each bond. Hereinafter the face value of these bonds will be used as their value. The records of the Treasury Department of the United States show that plaintiff cashed seven of these bonds of the value of \$600 registered in the name of plaintiff or defendant, and one bond for \$100 registered in the name of plaintiff or of

defendant on the death of plaintiff. Six of the bonds, totaling \$475, were registered in the name of defendant or plaintiff. Three of these bonds, for \$175, were cashed by defendant, and three bonds, totaling \$300, have not been cashed. The remaining six bonds, totaling \$925, registered in the name of plaintiff or defendant, were cashed by defendant. Plaintiff testified that she bought these bonds through the Commonwealth Edison; that she put defendant's name first and hers second, and on some her name first and defendant's name second, and did not present defendant with bonds "as a gift that I know of"; that defendant did not buy bonds. She later admitted that defendant had bought bonds from the savings and loan place. An employee of the Commonwealth testified that some bonds were paid for by payroll deductions and others in cash over the counter; that his records did not show how the bonds herein were purchased. There is evidence in the record that over the years defendant had purchased bonds aggregating \$9,050. Plaintiff further testified that she used the proceeds of the bonds cashed by her to purchase the frontroom furniture (not involved herein), and that she knew she had cashed some of the bonds when she made the statements of claim.

Defendant testified that the bonds payable to plaintiff or defendant were the property of plaintiff; that the bonds payable to defendant or plaintiff belonged to defendant; that these bonds, together with bonds belonging

to their brother Joe, were kept in separate envelopes marked in the name of the owner in an old safe formerly owned by their father, who predeceased the mother by at least several years, and that each of the owners of the bonds had the combination of the safe and knew where the key to it was kept. In this testimony regarding the safe she is corroborated by her brother Joe and contradicted by plaintiff. Defendant further testified that she cashed no bonds in the name of plaintiff or defendant, except at the express direction of plaintiff.

The records of the Treasury Department show that on May 8, 1951 defendant cashed two \$500 bonds, one registered in the name of plaintiff or defendant, the other in the name of defendant or her brother Joe. Defendant testified that these bonds were cashed to procure funds for payment of a year's rent on the flat on California avenue, each sister paying one-half. She produced a receipt for \$780 for rent from May 1, 1951 to April 30, 1952 signed by her brother-in-law, one of the owners of the flat. There are other receipts in evidence showing the payment of a year's rent in advance. Plaintiff denies any obligation for the rent or knowledge that her bond was being used for that purpose. The sister, one of the owners of the flat, corroborates defendant as to the payment of a year's rent in advance.

The records of the Treasury Department show that on June 9, 1949 defendant cashed two \$100 bonds, one in the name of plaintiff or defendant and the other in the name of defendant or plaintiff. Defendant testifies that these

bonds were cashed to provide funds for a vacation trip to the west. Plaintiff admits the vacation trip but denies the use of any of her bonds with her knowledge to provide funds for the vacation. Defendant testified that in January or February 1951 plaintiff bought a cloth coat for about \$140 and requested defendant to pick up the coat and to turn in a bond. The Treasury records show that on January 18th defendant cashed bonds as follows: \$25 bond registered in the name of plaintiff or defendant, a \$50 bond registered in the name of defendant or plaintiff, and a \$500 bond registered in the name of defendant or her brother Joe. There is no testimony as to the purposes for which three \$100 bonds in the name of plaintiff or defendant were cashed by defendant March 28, 1949. Plaintiff's statement that she never authorized the cashing of any of the bonds cashed by defendant is opposed by defendant's statement that she cashed no bonds except at the specific request of plaintiff. The Treasury records show that on this date defendant also cashed a \$25 bond payable to herself or plaintiff.

Testimony in respect to the household goods is conflicting. Some of the property claimed by plaintiff was in family use during the time the mother was the head of the household. Among the goods claimed by plaintiff is an oak dining room set, bought on the installment plan in 1933 or 1934 at a cost not exceeding \$215. It was used by the family until the mother's death and thereafter by plaintiff and defendant. Plaintiff claims that she paid the entire

cost. Defendant's testimony is to the effect that plaintiff paid four installments; that she became sick and the mother completed the payments. A brother, Frank, subpoenaed by plaintiff, testifies that he does not know who furnished the money for the payments. There is nothing in the record particularly describing this furniture or indicating that it was unique and of exceptional value. Plaintiff, however, testified that in October 1951, after being in the family at least 17 years, it was worth \$800 or \$900,--the court having previously stated that the question was not the market value of the furniture but "what is a fair and reasonable value of it to the plaintiff." The court later stated, in reference to another piece of furniture, that the plaintiff could place a sentimental value on it. In respect to repair of wooden torches, which plaintiff valued at \$25 or \$30 as the value to her, she testified on direct examination that they were made to match the dining room set and were received around 1945 or 1946--she "couldn't say if it was before my mother's death." On cross-examination she testified that these torches were given "to us as a Christmas gift," and when asked specifically what she meant by "us" she said, "I call the Klimas family as one--us." Among other items claimed are a steam iron and Community silverware. Defendant testified without contradiction that at the time plaintiff was moving her furniture and property from the California flat she made two lists of the articles taken. These are in evidence as plaintiff's exhibits. They

show that plaintiff received two sets of silverware and chests--one of Rogers silverware and the other of Community plate. Plaintiff testified that she bought the Community plate, on payments, around '37 or '38, at near \$100--"Well, about \$50." One of the lists made by defendant shows that plaintiff received the steam iron. Another article claimed is a Mother's chair--chrome rocker, which plaintiff says was bought in 1941 or 1942 and for which she paid \$45. Defendant testifies that plaintiff, defendant and the three brothers pitched in and bought this chair as a Mother's Day gift. Other items claimed by plaintiff are a Sunbeam iron, ironing board, toaster and tray, kitchen clock, shopping bag, Nylon gloves, marble clock, 3 ash trays, aluminum tray and coasters, carving knives, Radio motorola and end table, silver salt and pepper shakers, silver neck piece, one Bamboo frame, aluminum coffee maker, Rose spread, cookie jars, etc. A few of these articles were purchased in the lifetime of the mother and defendant claims they were the property of the mother. A few were purchased at the Commonwealth--some as early as 1948. Defendant admits possession of the articles which were in the house and used by the family in the lifetime of the mother. She claims she has no knowledge of some of the articles claimed by plaintiff and that certain of the articles, such as the steam iron and the silverware, were taken by plaintiff. Except as to the items hereinbefore mentioned, the only testimony tending to have any probative weight on the question of value is the price which plaintiff claims to have paid for

the articles when new. In attempting to arrive at the value of the household goods the court said, "If you take into consideration the element of guesswork on the part of the plaintiff--and there is a large percentage of guesswork--and if you take that into consideration, I think \$250 would be sufficient."

The trial court, who saw and heard the witnesses, apparently gave full credence to the testimony of the plaintiff. There are, however, certain inconsistencies and at least one rank absurdity in her testimony which, in our opinion, destroy the probative value of her testimony. This is a family quarrel, attended with the bitterness and unreasonableness incident to such squabbles, particularly on the part of the plaintiff. Neither her oath to the original and amended statements of claim nor her oath as a witness lessened her avarice, bitterness and unreasonableness. She claimed everything. Her sworn statements of claim that all the bonds were registered in her name or defendant's name and converted by defendant is contradicted by the records of the Treasury Department showing bonds issued to defendant or plaintiff or the brother Joe, and that bonds totaling \$700 were cashed by plaintiff. She admits that she cashed these bonds and knew that they had been cashed by her when she swore to the statements of claim. These contradictions, with the preposterous claim that the 17-year-old dining room set was worth four times the price paid for it on installments, destroy the probative value of plaintiff's testimony.

She is not a credible witness. She is nowhere corroborated on a material matter in dispute. In marked contrast is the attitude of defendant in frankly admitting that the bonds in the name of plaintiff or defendant belonged to plaintiff and in claiming only those bonds in which her name appeared first. She is corroborated by her brother and sister and by other facts and circumstances in evidence. The burden was upon plaintiff to prove her ownership of all bonds and household goods claimed by her and their conversion by defendant. The finding of the court is against the manifest weight of the evidence.

Other points raised on the appeal need little consideration. Plaintiff's claim is based on the alleged conversion of her personal property. This is an action in trover. Knight v. Seney, 290 Ill. 11. Had plaintiff proved her claim her damages would have been the fair cash market value of the goods. Wrenn v. Warble S. & F. Co., 236 Ill. App. 601.

The judgment is reversed.

REVERSED.

FRIEND, P. J., and BURKE, J., Concur.



45926

MARSHALL BENNETT & LOUIS S.
KAHNWEILER, co-partners doing
business as BENNETT & KAHNWEILER,
Appellees,

v.

ARNOLD A. SCHWARTZ,
Appellant.

126 A
APPEAL FROM

MUNICIPAL COURT

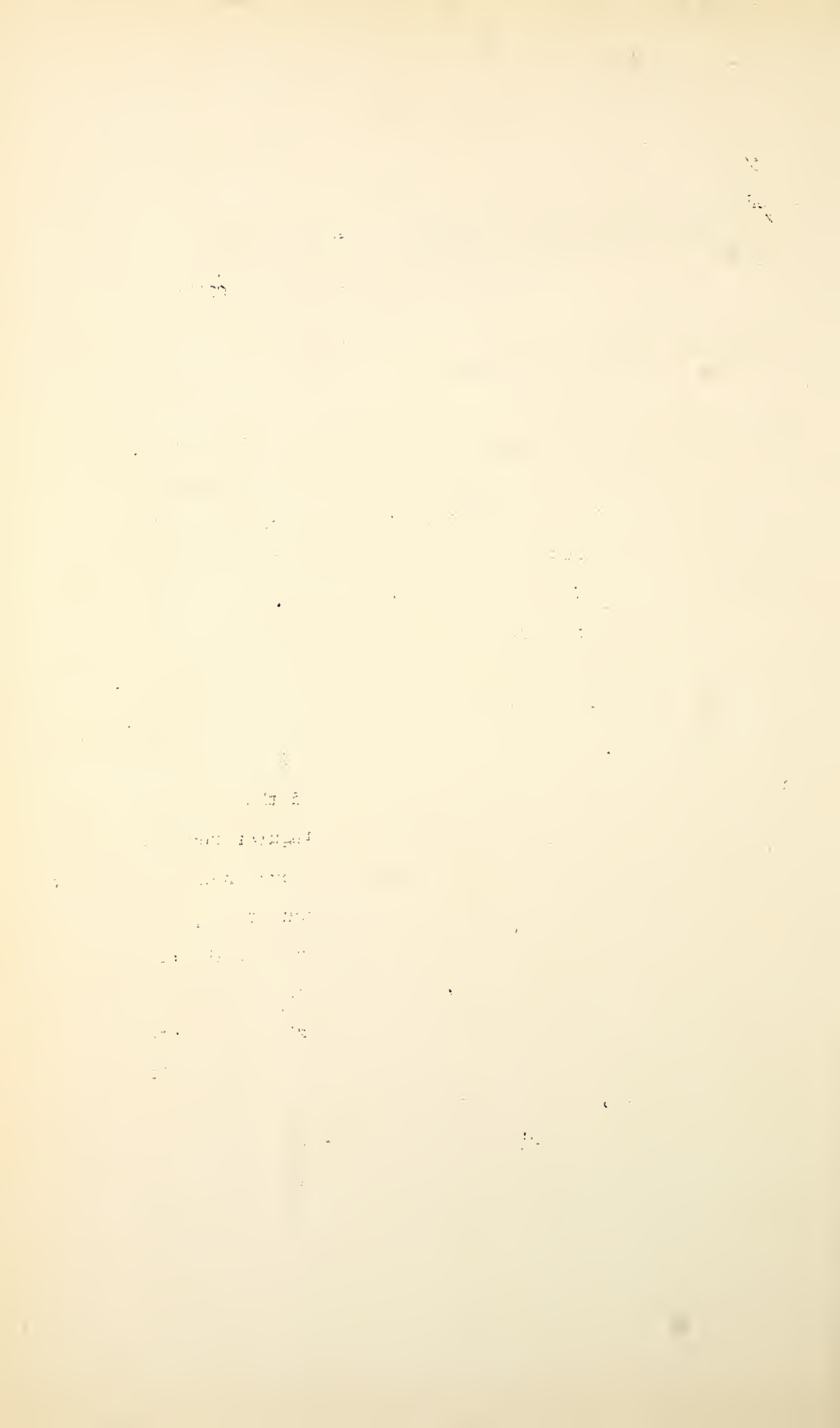
OF CHICAGO

349 I.A. 244

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$2,992.50 entered against him in plaintiffs' action for real estate commissions in procuring a tenant for defendant's 3-story building at 2625 West Grand Avenue, Chicago.

Evidence on behalf of plaintiffs is in substance as follows. Plaintiffs are duly licensed real estate brokers. Defendant had advertised his property for rent. July 10, 1950 Kahnweiler, one of the plaintiffs, called defendant in reference to his advertisement and was told that if plaintiffs procured a tenant they would be paid the regular real estate commission. Shortly thereafter Kahnweiler examined the premises, talked to several people over the phone about the space and mailed a notice to the Commonwealth Edison Company that the property was for rent. Nelson C. Peck, who was connected with a firm of management consultants who were endeavoring to locate a warehouse in the northwest part of Chicago for the Birtman Electric Company, phoned Kahnweiler in August 1950 stating that he had obtained Kahnweiler's name from the territorial information department of the Commonwealth Edison Company as broker of property which might be suitable for his client. Kahnweiler



gave him information concerning the property; Peck then wrote a letter to Birtman Electric Company giving the location of defendant's property and certain information as to space, elevator, etc., and stating that plaintiffs were the brokers. After this telephone conversation with Peck, Kahnweiler phoned defendant and told him that he, Kahnweiler, had submitted the space in defendant's building to Peck. Schubert and Neff, officers of the Birtman Electric Company, went to defendant's building the latter part of August 1950; defendant asked them how they got to know about the building and they showed him the letter from Peck; after some negotiations with defendant the Birtman Electric Company entered into a lease for the premises for a period of three years at an annual rental of \$33,250.00. September 8, 1950 the Birtman Electric Company notified Kahnweiler that they were entering into a lease with defendant. Immediately after this conversation, which occurred on Friday, Kahnweiler endeavored to reach defendant by phone, but without success; he was unable to reach him the next day; he talked with defendant on the following Monday morning, told defendant that the Birtman Electric Company had advised him by phone that they were leasing the space in defendant's building; that this was the electric company which he had mentioned to defendant in August, and that he, Kahnweiler, expected to receive his real estate commission for procuring the tenant.

Defendant was the sole witness in his behalf. He testified that in the conversation on or about July 10, 1950 he told Kahnweiler that if he found a suitable tenant, to submit

it and he, defendant, would determine whether he wanted that type of tenant; that in August, Kahnweiler asked him if the building was still available and said that he had heard that some electrical firm might be interested--that he didn't know the name of the firm; that defendant told him to let him, defendant, know when he found out; that was the last he heard from Kahnweiler until after he had consummated the lease. He discussed the space with Schubert and Neff, but neither of them mentioned the names of plaintiffs to him and he never saw the letter which Schubert and Neff stated they had shown to him.

The factual situation closely parallels the facts disclosed in Glass v. Liberty Nat. Bank of Chicago, 326 Ill. App. 251 (No. 43114, abst.). In that case plaintiff recovered commissions for the sale of real property which he had submitted to a lawyer for the benefit of his undisclosed client. In the instant case the trial court has accepted the testimony on behalf of plaintiffs and rejected that on behalf of defendant. It is not and cannot be contended that this finding was against the manifest weight of the evidence. Defendant, however, objects to the admission of certain testimony and exhibits offered by plaintiffs. Testimony of plaintiffs' efforts to procure a tenant, including the listing of the property with the Commonwealth Edison Company, was admissible. Forte v. Cohen, 199 Ill. App. 462 (No. 21110, abst.). The original letter from Peck to Birtman Electric Company giving the location of defendant's

[illegible]

Algebraische Geometrie (1974) 11 (1974) 111-112

to the present, the β and γ rays were not observed.

[illegible]

Journal of Management Studies, 19(6), 701-718.

Journal of Interpersonal Violence 26(10) 1978-1994

property and plaintiffs as the brokers, was lost. Witnesses from the Birtman Electric Company testified to the search made in an effort to locate the original letter, and identified the carbon copy produced from the files of the company as a copy of the letter shown defendant. This evidence was properly admitted. West Publishing Co. v. Lasley, 165 Ill. App. 256.

There being no error in the court's rulings on the evidence offered and received, the judgment is affirmed.

AFFIRMED.

FRIEND, P. J., and BURKE, J., Concur.

107

A

45742

EDWARD HOWARD,)	
Appellee,	)	APPEAL FROM SUPERIOR COURT,
)	
v.	)	COOK COUNTY.
)	
THOMAS ROCHE,)	
Appellant.	)	349 I.A. 387

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION
OF THE COURT.

Edward Howard, plaintiff, filed an action for damages for malicious prosecution and false imprisonment against Thomas Roche, defendant. The case was tried by a jury and a verdict was rendered in favor of the plaintiff and against the defendant for the sum of \$5,000. The jury made a special finding of malice. Judgment was entered on the verdict and the special finding of malice. Motions for new trial and for judgment notwithstanding the verdict were made and overruled.

Defendant's first contention is that the verdict is against the manifest weight of the evidence. A summary of the evidence reveals that plaintiff at the time of the occurrence was a married man with two small children and his wife was expecting a third child. He was employed by the City of Chicago and from time to time to make extra money he worked at a tavern on Belmont avenue about three blocks from his home. In the early morning hours of February 10, 1949, while he was doing extra work at the tavern the defendant Roche, a police officer, came into the tavern at about 3:30 A.M., a half hour before quitting time. There were about 15 or 16 people in the tavern and the plaintiff was standing alone towards the rear of it and

1. The first part of the document is a list of names and addresses of the members of the committee. The names are written in a cursive hand, and the addresses are written in a more formal, printed hand. The list is organized in a table-like format with columns for names and addresses.

2. The second part of the document is a list of names and addresses of the members of the committee. The names are written in a cursive hand, and the addresses are written in a more formal, printed hand. The list is organized in a table-like format with columns for names and addresses.

3. The third part of the document is a list of names and addresses of the members of the committee. The names are written in a cursive hand, and the addresses are written in a more formal, printed hand. The list is organized in a table-like format with columns for names and addresses.

4. The fourth part of the document is a list of names and addresses of the members of the committee. The names are written in a cursive hand, and the addresses are written in a more formal, printed hand. The list is organized in a table-like format with columns for names and addresses.

5. The fifth part of the document is a list of names and addresses of the members of the committee. The names are written in a cursive hand, and the addresses are written in a more formal, printed hand. The list is organized in a table-like format with columns for names and addresses.

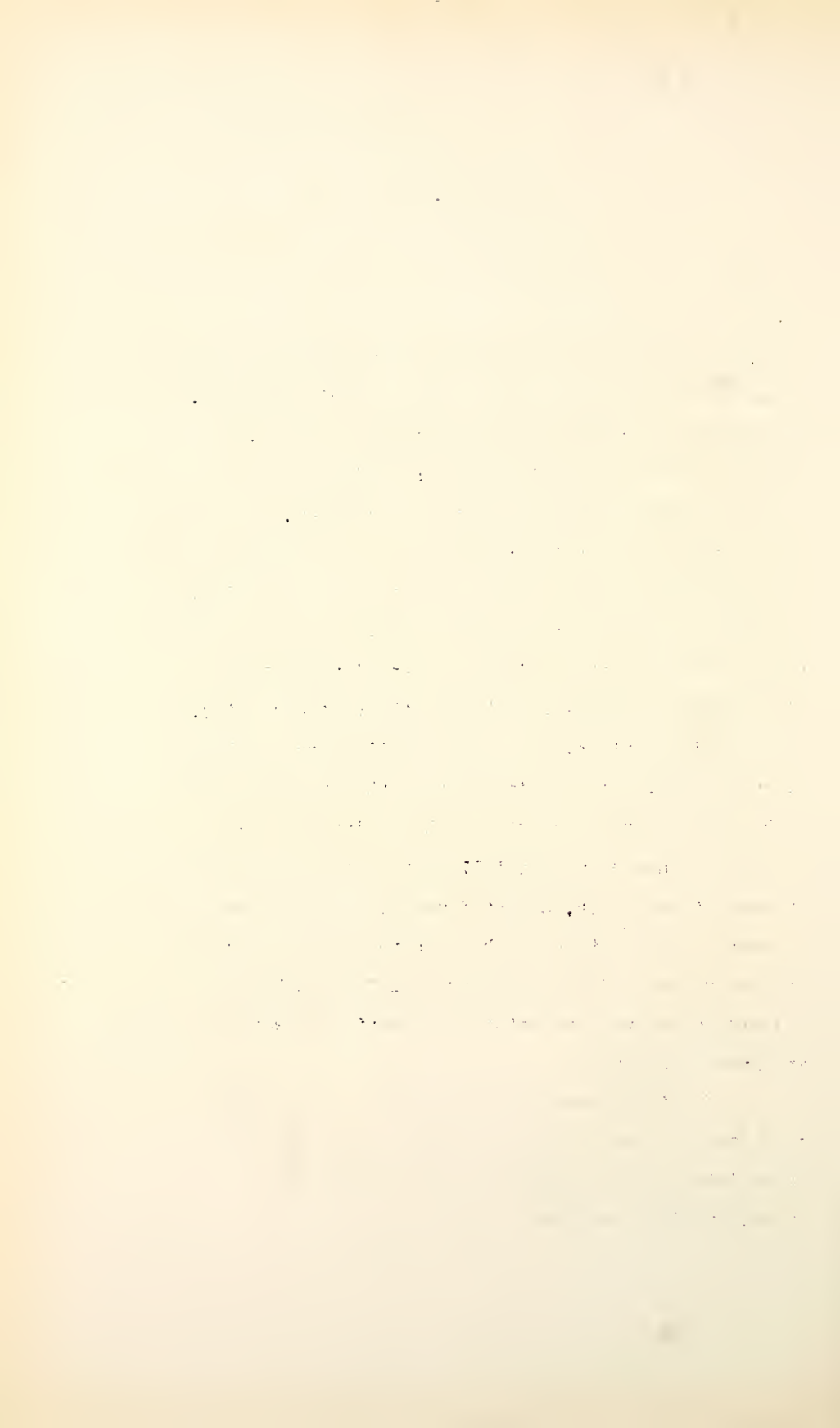
6. The sixth part of the document is a list of names and addresses of the members of the committee. The names are written in a cursive hand, and the addresses are written in a more formal, printed hand. The list is organized in a table-like format with columns for names and addresses.

outside of the bar. When the defendant, who was a police sergeant, came up to the plaintiff and asked him what he was doing there, plaintiff stated that he was working and the defendant said, "You are a god damn liar." Plaintiff told him to ask the manager. The manager told him that plaintiff was working and asked what was the matter. Defendant told the manager to get plaintiff out. He said, "If you don't do that I will shoot you. I have done that before." The manager became sick and plaintiff offered to help him. Defendant told plaintiff he was taking him to the station and threatened the manager with closing the place. Many of the customers left at the time of this conversation but another customer named Duffy was taken into custody with plaintiff. At that time another police officer named John Walsh came in. Plaintiff and Duffy were arrested and taken to the police station. Plaintiff was taken to the Detective Bureau at 11th and State, placed in a cell and forced to attend a showup. He was returned to his cell and released about 1:00 A.M. on February 11. Plaintiff was tried in the police court and discharged. Plaintiff stated that the only witness at the trial was the defendant. Plaintiff's testimony was substantially corroborated by Duffy.

Defendant's version of the case was that he and two officers, Kaufman and Walsh, were patrolling in a squad car and at about five minutes after four on the day in question they saw the tavern, where plaintiff was arrested, with its lights on. This was five minutes after closing

hour. He and Walsh went into the tavern and told the customers to leave because it was after closing hour. Plaintiff and Duffy remained sitting at the bar. Plaintiff used profane language and said he had bought drinks and he was going to drink them. Defendant stated that both Howard and Duffy were intoxicated. He took them outside and had the patrol wagon called. Duffy told him if he took his partner, he had to take him. The wagon arrived in about ten minutes and plaintiff and Duffy were taken to the police station. Defendant's testimony was substantially corroborated by John Walsh. His testimony as to the events that took place after defendant brought plaintiff out of the tavern was substantially corroborated by the other police officer, Albert Kaufman. Defendant further stated that he had been on the police force from August of 1916 to February of 1951 when he retired and that at the time of the trial he was drawing a pension.

This summary reveals that a sharp issue of fact was presented to the jury and we are of the opinion that there was ample evidence to sustain their verdict.



The next contention made by the defendant for reversal is that the closing argument of the plaintiff was replete with improper comment upon matters outside of the record and contained uncalled for, unwarranted and prejudicial statements that aroused the passions of the jury and inflamed their minds against defendant.

In arguing a case to a jury, counsel are privileged to discuss the evidence introduced and all reasonable inference that may be drawn therefrom but they must not undertake to create a prejudice against the opposing party by indulging in personal abuse or inflammatory remarks calculated to arouse the passions and prejudice of the jury so as to bring about a verdict for the client.

People v. Bimbo, 314 Ill. 449; People v. Chrfrikas, 295 Ill. 222; Raucci v. Connelly, 340 Ill. App. 280.

The record of the remarks of counsel for plaintiff in his closing argument speaks eloquently for itself. We quote first some of the statements that were without basis in

evidence.

"Did you get the names of the people in that bar room; did you arrest Mr. Connie; did you charge him with a violation; did you write a letter to the Commissioner of Police; did you write a letter to the Liquor Commissioner; did you write a letter to the Mayor to close this place?" Why, this is a respectable place. He can easily say Connie was open because Connie is dead. He likes two things, a dead man and a confessor.

"Mr. Peters: Wait a minute, if your Honor, please, I think that is highly prejudicial.

"The Court: I think that last remark is highly prejudicial.

"The Plaintiff: I have a right to make my reasonable deductions.

"Mr. Peters: Saying the defendant likes dead men, I think is highly prejudicial.

"The Court: There is no evidence in this case that the defendant threatened to shoot the plaintiff. The jury heard the evidence. They may treat it as they see fit.

"Walsh, has been on the Force since 1937. Just think of it, a little over three years. He doesn't talk to Walsh to help him. Way back in 1949, he don't talk to Walsh to corrupt him. In 1950, he don't talk to Walsh to corrupt him. He don't hand him a subpoena to give him strength and dignity of purpose. For two years, he doesn't even present him to the distinguished lawyers in the Office of the Corporation Counsel. He had no idea Walsh would testify to these facts. These facts were not in existence, they were not in existence even when we were picking this jury. He hadn't talked to Walsh. He hadn't seen Walsh. He hadn't sent a subpoena out in the line of duty in the Police Department to be filed with the Commissioner of Police directing the officer to proceed orderly into a civil suit, because they do not allow their officers to go into court without full knowledge of the department. He goes into the Corporation Counsel's office. They take no statement from him. There is nothing said there about intoxication on the Thursday that he was there. The following week the distinguished Corporation Counsel would have addressed you and told you that my client was a drunken bum, that he was drunk, that he was abusively drunk. What a falsifying situation to pull over the wool of a jury of our peers, people of dignity that come in here and lend your services at the minimum scale, humiliated by the absence of your

work to do your sacred duty, to hear a man thirty years on the Department get on the stand and tell you that he never talked to him on the morning of the tenth, he never talked to him on the morning of the eleventh, he didn't talk to him on the continuances, he didn't bring these two officers into the court room and have them sworn to testify in this case. He can do these things now. He is not on the Department. He is a free agent to connive, to conspire."

There is nothing in the record to indicate that defendant corrupted Walsh.

"After the plaintiff's case had rested we find them assembled here in the hall--the crassness of it all--on the windowsill, humiliating a man that has to represent him. He has no choice to walk out of this case like a private lawyer, to withdraw and say, 'this man I will not represent.' He has to stay in this case. For him to leave this lawsuit now would be traitorous to the Department of Honest Men, like deserting your general on a field of combat. You know that the maneuver of your general is going to be costly and there are better avenues of escape. He could go to the Mayor and say he gave him a lot of witnesses and he didn't put them on the stand. He has to put them on. He is representing him the same as a State's Attorney is representing the people in the prosecution of a criminal case. He must call all witnesses, even the ones that help the other side.

"But for Peters, I am in sympathy with a brilliant lawyer like this to have to represent this kind of a man. It can only happen once in a life time. It can never happen again. Did you ever hear of many of these suits; of course, there is not many of these suits, but there is enough of them and we are wedding them out as fast as we can, that type of public servant who don't respect the citizen, the taxpayer, the fine little lady going home listing a little, and lifting them up and taking them pleasantly to a corner where they can find a name and address."

There is nothing in the record about anything that took place in the hall outside of the court; nothing in the record to show that he humiliated his attorney.

"So the Sergeant and the lieutenant and the Colonel, the young West Point Graduate went to his death lying like hell to save the Constitution, but this fellow will lie on this stand to deny Howard the rights of a free-agent, a right to live and breathe, the right to be what he wants to be, to move physically about as he desires. I can't

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study.

2. The second part of the report is a detailed description of the methodology used in the study. It discusses the data sources, the data collection methods, and the data analysis methods.

3. The third part of the report is a detailed description of the results of the study. It discusses the findings of the study and the conclusions drawn from the results. It also discusses the implications of the study for future research and practice.

4. The fourth part of the report is a discussion of the limitations of the study. It discusses the strengths and weaknesses of the study and the implications of the limitations for the results of the study.

5. The fifth part of the report is a conclusion. It summarizes the findings of the study and the conclusions drawn from the results.

6. The sixth part of the report is a list of references. It lists the sources of information used in the study.

countenance a lie to destroy the rights of others. He took Walsh and corrupted him; he made a liar out of Kaufman, and I asked Kaufman how he was dressed, and he said he had a brown trench coat on but he said it after long hesitation of seconds. Has any of them ever denied that he wasn't in sleeves? Has any of them ever denied that he didn't have overalls on? You see, there is so many gaps in a lawsuit, ladies and gentlemen of the jury, that in search of facts it becomes a torch. This fellow is not a torch. You saw him on the witness stand. He is a hand grenade. If you pull its pin, step back."

There is nothing in the record to show that he took Walsh and corrupted him and made a liar out of Kaufman.

"He is suffering because of the fact he is worried about this wife and his job with the City, and he has had a new job since this suit was started, a better job, but he is still worrying about his wife. What a humility. When his wife was walking down the street--these people are all of the same faith and the same nationality. It is a shame. It is a cruel inhuman act, and when she walks into the temple to worship, she walks down the aisle to make her peace with God. Mrs. Roche can be sitting in there and say, 'My husband threw him in jail.' That is the way that is. Policemen don't think that way when they are not good policemen, when they are not honorable men."

There is nothing in the record as to his wife's religion or as to how or what she felt when she walked into the temple of God.

The following are a few of the remarks of counsel for the plaintiff that could only be calculated to unduly arouse the passion and prejudice of the jury against the defendant:

"Did Mr. Roche deny here, or did Mr. Walsh, that Mr. Connie became weak and nauseated and sat down? And then they tell you the cock-and-bull story--the maliciousness is stronger every moment. Watch the evidence in this case. This case is eighteen months old. You can't be fooled unless you want to follow a diabolical conspiracy to deny the man the right of enforcing the lawsuit in conformity with the statutes of this State and the constitution of the nation. A little step further to show you this. Eighteen months ago, he doesn't even tell Walsh he has a suit for twenty-five thousand dollars against them. He never discusses the case with them from the night he was in the saloon. He has a good case. He

said 'I arrested a man. I had probable cause to arrest him. I threw him in the bastille. I locked him up.' Like they would in Calcutta or Bagdad. We are in the United States of America with the Constitution and court rooms that are to be honored and respected.

"'Give me a break.' A common vernacular of that kind of arresting officer.

"Of course, if he said he wanted a break, he wanted to go home to his children. He had done nothing.

"How would you like to meet Roche on the street and you say you are right and he says you are wrong; are you going to win? Roche is coming. Thirty years on the Department and testifying in thousands and thousands of cases for the State. Did he ever testify for a defendant? What is a defendant? In many cases, a citizen of this community.

"Does he have any witnesses when he goes into the police court? Now, he told the evidence there on the stand, the word he used, the phrase that he expressed, he used it before the question was even asked him, and he put eloquent emphasis on the profanity of it, and his mind must have been permeated from a sewer. He did it to prejudice you.

"I have never heard uttered from this witness stand, voluntarily, the corruptness I heard, and I never heard the doctrine of suspicion so evilly expressed, and I have always been told by my father in this profession that suspicion was a child of ignorance, the offspring of imbecility. Just see what a chance you would have with this fellow testifying against you in a criminal case if you were not corroborated'.

"Why, he is like a drowning man grasping for a straw. He is like a bull in the pampas. He is back up against the wall, his two hundred forty or two hundred twenty-five pounds of frame on that witness stand, his lips could be no longer padlocked or opened. He resorts to the cry of the criminal, 'I have been framed.' I don't remember when he was asked a question that he answered it.

"No worse than the slave when he locked up at the poor people of those days, the black flesh of God's child, and heard the clanging of the chains on his ankles. He saw the beautiful black girl with her symmetrical fortune standing stripped. Those were days of slavery. This was an hour of slavery for Howard. And back, another cell, and back again, and back to the cell again. Where is Mr. Roche all this time? He is at breakfast one morning, that night he is at dinner, that day he was with his family. Does he think of Howard?

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"I am amazed, as an officer of this court, that never before in my life have I heard a man--I have a great respect for people. I believe in good sportsmanship. I believe in debate. I shouldn't think he should play the part of a child with toys, pick them up and go home.

"Did they explain why they arrested Duffy? It was the cheapest, most rotten explanation ever made in a court of record. They took him out--he interfered with the other officers making the arrest in front of the wagon. Why, they had already arrested him in the saloon, and they took him out and they didn't have anything on him at all. There was nothing said about him, and he was locked up and he went through Calcutta, too. I don't represent him. I said if I did, he would be in this lawsuit. I leave it with you. I think your judgment will be the judgment of a good government."

This court said in Gordon v. Checker Taxi Co., 334

Ill. App. 313:

"While it is regrettable that this case must be reversed because of improper conduct of intelligent and able counsel, yet if courts of law are to be sources of justice, the rule that parties litigant, regardless of who they may be, shall have secured to them the opportunity to have the issues of their case tried by a jury free from the prejudicial influence of improper conduct of counsel must be strictly enforced."

Even though, as the record indicates, defendant's testimony was properly subjected to denunciation, plaintiff's attorney in his closing argument seems to have abandoned all sense of legal discipline, made statements not based on the evidence or on reasonable inferences that could be drawn therefrom, and deliberately proceeded to create prejudice against the defendant by indulging in personal abuse and inflammatory remarks. This was reversible error.

[illegible]

1. 1990年12月，在《中国环境报》上，刊登了“中国环境状况令人堪忧”的标题，并附有“中国环境状况令人堪忧”的副标题。

For the reasons stated, the cause is reversed and remanded with directions to the trial court to grant defendant's motion for a new trial.

Reversed and remanded with
directions.

Schwartz and Tucky, JJ., concur.

108 A

45801

WILLIAM A. BOETTCHER and)	
ARTHUR C. BOETTCHER,)	
Appellants,	)	APPEAL FROM SUPERIOR
)	
v.	)	COURT, COOK COUNTY.
)	
HAROLD C. BOETTCHER,)	
individually and as trustee,)	
ADA BOETTCHER and ADA BOETTCHER)	
DUUS,)	
Appellees.)	

349 I.A. 3881

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION
OF THE COURT.

This is an appeal from an order entered by the trial court striking plaintiffs' amended complaint and dismissing the cause for want of equity. The action was brought in equity by William A. Boettcher and Arthur C. Boettcher, who are beneficiaries of a trust created by their father, William J. F. Boettcher, deceased, against defendants Harold C. Boettcher, individually and as trustee, Ada Boettcher and Ada Boettcher Duus, all of whom are likewise trust beneficiaries.

The amended complaint, after identifying the parties, sets out the creation by the will of William J. F. Boettcher, deceased, of a testamentary trust which included substantially all of the property of the decedent and, particularly, an unincorporated business known as "The Boettcher Company," which decedent had operated for many years, and the real estate where the business was located. A copy of the decedent's will is attached to the complaint as an exhibit and incorporated in the amended complaint by reference. It is alleged that defendant Harold C. Boettcher,

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident.

In the second part of the paper, the author discusses the various theories of the origin of life. He begins with the theory of spontaneous generation, which was the dominant theory of the origin of life until the middle of the nineteenth century. He then discusses the theory of biogenesis, which was developed by Louis Pasteur. Finally, he discusses the theory of abiogenesis, which is the theory that life arose from non-life through a series of chemical reactions.

The author concludes that the theory of abiogenesis is the most plausible theory of the origin of life. He argues that the theory of spontaneous generation is based on a false premise, namely, that life can arise from non-life without the intervention of pre-existing life. He also argues that the theory of biogenesis is based on a false premise, namely, that life can only arise from pre-existing life. Finally, he argues that the theory of abiogenesis is based on a true premise, namely, that life can arise from non-life through a series of chemical reactions.

who was appointed trustee in said will, has, since the death of the decedent, operated the business as trustee. He is charged with mismanagement resulting in an almost total dissipation of the trust corpus, with converting a portion of the proceeds of the sale of the real estate, owned by him as trustee, to his personal use, and with distributing the remainder to Ada Boettcher contrary to the terms of the will and pursuant to a scheme to secure the money for himself. It is further alleged that he procured this money from Ada Boettcher and used it to purchase a farm in Wisconsin. The trustee is also charged with conducting, on his own account on trust property, a refrigeration repair business without paying any rent or other fees into the trust corpus. It is further alleged that the trustee, since about May 1, 1951, has neglected the business enterprise by consistent absence from its headquarters, and has since that date purchased a new automobile and a Wisconsin farm with trust moneys and threatens to remove all of the remaining trust property out of the State of Illinois.

Defendants' answer consists of three parts. The first admits the existence of the trust and the relations of the parties thereto. It also admits that the business enterprise, as operated by the decedent, was profitable. It denies that the property came into the hands of the trustee by the will, averring that he received the real estate by deed, but does not deny that the trustee is

controlled by the trust provisions of the will. It admits that the trustee has operated the business, but denies that he has dissipated the assets thereof, it being set forth that the business has become unprofitable because of competition, war time restrictions and other circumstances beyond his control.

It is alleged that the business was adversely affected by a suit filed by the plaintiff William A. Boettcher, in 1948 in the Circuit Court of Cook County, Case 48C 9662, against the trustee. It states that by a decree entered in the cause dated November 1, 1949, the trustee was given full power to use the principal as well as the income for the comfort and maintenance of defendant Ada Boettcher. The answer sets out that the sale of the property was not voluntarily made, but pursuant to a judgment in a condemnation proceeding. It is alleged that the proceeds were not wrongfully converted, as charged in the complaint, but were used in part to repay Ada Boettcher sums advanced by her to the trustee and in part to pay the back salary of the trustee. It is alleged that moving the assets of the trust out of the State of Illinois is justified because of the necessity of vacating the real property sold to the City of Chicago and because the location of the business headquarters in Wisconsin will enable the trustee to operate without overhead costs.

The second part pleads the decree entered on November 1, 1949, in the Circuit Court of Cook County, as res

judicata of the issues raised by the amended complaint, and the third part incorporates by reference the motion to strike made by defendants against the original complaint and also defendants' motion to dismiss the suit and for summary judgment.

Plaintiffs filed a motion to strike the answer which called the court's attention to the fact that the answer in many paragraphs did not admit, deny nor set up new matter constituting a defense, but on the contrary evaded the charges made in the complaint and introduced facts which had no bearing on the controversy.

It is not clear from the record what took place next. There is mention in the briefs of an extended conference in the judge's chambers by respective parties which was apparently in the nature of a pre-trial conference. Thereafter, on January 4, 1952, the following order was entered:

"On Motion of Attorneys for said defendants, the court having heard the argument of counsel and being fully advised in the premises,

"It is hereby ordered, adjudged and decreed by the court that plaintiffs' amended complaint heretofore filed herein be stricken and that said cause be and is hereby dismissed for want of equity, at plaintiffs' costs."

In examining the complaint and answer it is apparent that triable issues were raised, such as mismanagement by the trustee, failure to make an accounting, abuse of authority in the expenditure of funds from the sale of real estate, and nonresidence with removal of funds beyond the jurisdiction of the court. Defendants' answer, which

is long and rambling, joins issue on some of these charges and as to some evades the charges and sets up new facts. It is difficult to determine what bearing they have on the controversy. As to the plea of res judicata of all of the issues by a previous decree in the Circuit Court, there is nothing in the order to indicate that the court passed on this issue. Even if it did, some of the charges against the trustee took place subsequent to entry of the decree.

While it is not mandatory, this case is an example of why a trial court should make adequate findings in a final order, so that the reviewing court will be in a position to determine the issues decided by it. This we are unable to do by the order in this case. We are of the opinion that plaintiffs were not given their day in court.

The trial court should (1) determine what allegations are properly pleaded in the amended complaint; strike those, if any, which are not, and as to those, if plaintiff so moves and makes a proper showing therefor, to amend his complaint; (2) when issue is joined, if the previous decree of the Circuit Court is pleaded as res judicata, determine what issues, if any, are decided by it; and (3) thereafter on those allegations on which issue is properly joined, a trial should be had to determine the rights of the parties.

The order of the trial court dismissing the complaint for want of equity is reversed and the cause remanded with directions to proceed in conformity with the views expressed in this opinion.

Reversed and Remanded with directions.
Schwartz and Tucky, JJ., concur.

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A

45810

MARIE T. SCHUMACHER, Appellant,

v.

MATHEW SANTEL, DR. BENJAMIN
L. SARGENT and HANNAH
LIESEMEYER,

Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

349 I.A. 388²

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION
OF THE COURT.

This is an action by Marie T. Schumacher, plaintiff, against Mathew Santel, Dr. Benjamin L. Sargent and Hannah Liesemeyer, defendants. The amended complaint of plaintiff consists of three counts. The first count against defendant Santel was dismissed by order of court prior to the trial. The second count charged that defendant Sargent, intending to injure the plaintiff made, executed and delivered a letter or certificate to the effect that the plaintiff was mentally ill and in need of mental treatment. It further alleged that the doctor never actually examined the plaintiff and that the letter was made falsely with intent to injure the plaintiff and was part of a conspiracy with the other defendants to injure the plaintiff and that the statements made in Sargent's letter were libelous per se. The third count charged defendant Liesemeyer with conspiring with the other defendants to oust plaintiff from her abode, of which Liesemeyer was the landlord, and to effect such result conspired with the other defendants and caused Santel to illegally arrest the plaintiff and caused Sargent to issue a letter embracing

1. The following information was obtained from the records of the
 2. Federal Bureau of Investigation, Washington, D. C., dated 10/10/50.
 3. The following information was obtained from the records of the
 4. Federal Bureau of Investigation, Washington, D. C., dated 10/10/50.
 5. The following information was obtained from the records of the
 6. Federal Bureau of Investigation, Washington, D. C., dated 10/10/50.
 7. The following information was obtained from the records of the
 8. Federal Bureau of Investigation, Washington, D. C., dated 10/10/50.
 9. The following information was obtained from the records of the
 10. Federal Bureau of Investigation, Washington, D. C., dated 10/10/50.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible]

false statements and conclusions. As a result of such conspiracy, the plaintiff was illegally arrested, lodged in the Psychopathic Hospital and subsequently illegally committed to the Elgin State Hospital.

At the close of plaintiff's case motions were made by defendants Sargent and Liesemeyer that the court instruct the jury to find each defendant not guilty. The court entered judgment on the verdict.

Plaintiff contends that the evidence adduced by her at the trial was of such a nature that a jury acting reasonably in the eye of the law might or could have returned a verdict in favor of the plaintiff and that therefore the trial court should have denied a motion for a directed verdict. The courts of this State have discussed the question of a directed verdict in numerous decisions. The rule to be applied upon such a motion is whether there is any evidence in the record from which a jury acting reasonably could return a verdict for the plaintiff. If there is such evidence, the motion should be denied; if not, then the motion should be granted. Brandt v. Brandt, 286 Ill. App. 151; Libby, McNeill & Libby v. Cook, 222 Ill. 206; Allen v. United States Fidelity & Guaranty Co., 269 Ill. 234; Devine v. Delano, 272 Ill. 166; Ginsberg v. Ginsberg, 361 Ill. 499.

To decide this question, we must examine the record. Summarized it reveals that in September of 1945 plaintiff rented and occupied rooms in a residence owned by defendant

Liesemeyer at Park Ridge, Illinois. At first she occupied the premises by herself but later her sons moved in with her. Differences arose between the plaintiff and defendant Liesemeyer and two complaints were taken out by defendant Liesemeyer against the plaintiff. At one time the plaintiff was detained in the county jail for five days.

Defendant Liesemeyer talked with Officer Santel about the plaintiff; also with the Chief of Police of Park Ridge and the local police magistrate. She talked with defendant Sargent when he requested her to come to his office about a complaint made against her by the plaintiff. She might have said something about the fact that plaintiff was ill. She didn't ask defendant Sargent to prepare a certificate stating that plaintiff was mentally incompetent. She discussed plaintiff's mental illness with one of plaintiff's sons and with her sisters. She had a letter written to the sisters asking them to come to Park Ridge and take care of the plaintiff. She admitted that she had asked the plaintiff to move and had gone to the police about it. She had served the notice of termination of tenancy which was followed by a complaint for a forcible entry and detainer.

In July of 1946 plaintiff discovered that her electricity had been turned off and on advice of her attorney she went to the local health commissioner, who was the defendant Sargent. She did not see him but registered a complaint with a nurse who was an attendant

in his office.

In July of 1946 two sisters of the plaintiff came to the office of defendant Sargent and had a conversation with him about their sister's condition. Previously he had heard about the plaintiff from Mrs. Liesemeyer when he had told her of plaintiff's grievance about the shutting off of the electricity. He talked with Judge Stolle, the local police magistrate, the Chief of Police and Officer Santel. On July 26, 1946, he issued a letter to plaintiff's sisters which read as follows: "In re Mrs. Marie Schumacher. It is my opinion that the above captioned individual is mentally incompetent and is in need of institutional care." One of plaintiff's sisters admitted that she did see defendant Sargent but denied that she asked him for the letter. She admitted that her other sister was in Park Ridge with her at the time of the conversation with Dr. Sargent but denied that she was present. She denied that she had written a letter to Chief of Police Johnson of the Park Ridge police but upon being shown a letter addressed to him admitted that she had written it and that plaintiff's son, David, had phoned twice and said his mother was so bad he had to put her in a hospital on Foster avenue.

Plaintiff admits that she was committed to Manteno in 1943 with a diagnosis of paranoia. Subsequently she visited the Psychopathic clinic several times. On July 27, 1946, plaintiff was taken to the Psychopathic Hospital on

the basis of a petition which was signed by Paul Quidd to which was attached defendant Sargent's letter. Thereafter based on the report of S. A. Sugar, M.D. and Maurice A. Schiller, M.D., commissioners appointed by the County Court, plaintiff was found to be mentally ill and was ordered committed to the Elgin State Hospital. Plaintiff remained there about one month when she was released to her sister.

We find no evidence in the record that would indicate any malice on the part of defendant Sargent toward the plaintiff. The lone fact that he talked with defendant Liesemeyer about plaintiff is not sufficient to constitute a conspiracy. Miller v. West, 167 Atl. 696, 698; Brandt v. Brandt, 286 Ill. App. 151.

Plaintiff attempts to attack collaterally the record of the County Court. On their face, these records show an ordinary commitment procedure in which the court had jurisdiction over the plaintiff. No appeal was taken from the order. The proceedings in the County Court were pursuant to Article 6 of the Revised Mental Health Act, Ill. Rev. Stat. 1947. Plaintiff cites Article 5 of the Act to support her contentions. This requires a personal examination by a doctor when a person is to be detained without an order of court. This section is not the one under which plaintiff was committed but provides for a full inquiry by the court into the person's condition. The order of commitment in this case was not based on defendant Sargent's letter but upon the recommendation

of Doctors Sugar and Schiller, commissioners of the court, and after a full hearing the court committed the plaintiff to the Elgin State Hospital. The record of the County Court is proper on its face and cannot be collaterally attacked in this case. Searle v. Galbraith, 73 Ill. 269, 272; Freedman v. Freedman (Mich.), 6 N.W. 2d 924.

As to the defendant Liesemeyer, there is nothing in the record to show that she caused Dr. Sargent to execute the letter that was attached to the petition in the County Court. We have already found that the action of the County Court and its order was a complete defense as to defendant Sargent. Defendant Santel was dismissed by order of court. To prove a conspiracy two or more parties must be involved. Defendant Liesemeyer could not, therefore, be guilty of conspiracy. There is no showing in the record that connects her with the writing or delivery of the letter by defendant Sargent that was attached to the petition filed in the County Court. The only thing that the record shows is a disagreeable landlord and tenant relationship. We find nothing to support the cause as alleged in the complaint against defendant Liesemeyer. The rulings of the trial court are affirmed.

Affirmed.

Schwartz and Tuohy, JJ., concur.

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45832

NICKOLAS L. BARNES,)	
Appellant,)	
)	APPEAL FROM MUNICIPAL
v.)	
)	COURT OF CHICAGO.
WILLIAM DIXON,)	
Appellee.	)	349 I.A. 389

MR. PRESIDING JUSTICE ROBSON DELIVERED THE
OPINION OF THE COURT.

Nickolas L. Barnes, plaintiff, a tenant of William Dixon, defendant, filed an action as set forth in his second amended statement of claim to recover a refund for overcharges of rent which the plaintiff had paid to the defendant over a period of two and one-half years from August 9, 1948, until February 9, 1951, based upon an order of the office of Housing Expediter dated December 19, 1950, which was pursuant to Sec. 205 of the Housing and Rent Act of 1947, as amended. Defendant filed a motion to strike and dismiss the second amended statement of claim because the statute of limitation under Sec. 205 limited plaintiff's recovery to a period of one year. Plaintiff elected to stand on his second amended statement of claim and filed a motion to vacate the order of the trial court striking it. This motion was denied and plaintiff appealed.

The question involved on the appeal is whether or not the order entered by the Housing Expediter dated December 19, 1950, directing the refund of overcharges of rent collected by defendant for a period of time longer than one year is a valid order, and whether or not plaintiff seeking to recover by virtue of this order can

maintain his action at law to recover overpayment of rent for a period of time longer than one year.

This court in the case of Woods v. Murray, 336 Ill. App. 181, decided the question. We held that the one-year statute of limitation contained in Sec. 205 commenced to run on the date when the landlord refused to obey the order directing refund. Cited in support of this conclusion is Woods v. Stone, 333 U.S. 472, which is to the same effect. In the case before us the order of refund was issued on December 19, 1950. It allowed the landlord thirty days to comply. He did not comply and plaintiff filed his suit on February 9, 1951, which was well within the one year as interpreted by Woods v. Murray.

The order of the trial court denying plaintiff's motion to vacate the order dismissing the action is reversed and the cause is remanded with directions that the motion be sustained, that defendant file an answer to plaintiff's second amended statement of claim within a reasonable time, and that such further proceedings be had as may be necessary and appropriate.

Order reversed and cause remanded
with directions.

Schwartz and Tuohy, JJ., concur.

45813

FRIEDA KRAKOW,)
Appellant,) APPEAL FROM SUPERIOR
v.) COURT, COOK COUNTY.
HARRY KRAKOW,)
Appellee.)

349 I.A. 390¹

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF
THE COURT.

This is an appeal from orders entered in a divorce suit, finding defendant not guilty of contempt, discharging him from a rule to show cause, quashing a writ of ne exeat against him, and awarding damages to defendant on account of the unlawful issuance of the writ. No brief was filed on behalf of defendant.

The parties to this cause have a seven-year old child. Defendant had been ordered to pay \$15 per week for support of this child, and being in arrears, plaintiff filed a petition to have him held in contempt and also sought a writ of ne exeat. The writ was issued and defendant was taken into custody and released upon the filing of a bond in the sum of \$1250. Rule to show cause was issued on petition of plaintiff, to which defendant filed a sworn answer, asking that the rule be discharged and the writ of ne exeat quashed. Defendant also petitioned for modification of the decree, to which plaintiff filed an answer. The matter was referred to a special commissioner, who made his report finding that defendant was indebted to plaintiff for child support in the sum of \$990, but that failure to pay was not wilful

and did not constitute contempt. The report recommended that the bill for divorce be modified so that defendant be relieved of his obligation to support the child. The matter then came up on exceptions to the report. The court found that defendant's failure to pay the arrears of \$990 was not wilful and did not constitute contempt. The court overruled the special commissioner, however, on the issue of modification of the decree and let the order stand. The court also quashed the writ of ne exeat.

Plaintiff remarried and left Chicago to live in Florida. Defendant spends the winters in Florida and the summers in Chicago. He defends in part on the ground that the child was removed to Florida without leave of court. However, he made no objection to the removal and continued to pay support money for three years thereafter. Under such circumstances, this did not constitute justification for defendant's failure to contribute to the child's support. The allowance was for the care of the child, and the fact that the mother removed her to another jurisdiction does not relieve the father of his duty to make some provision for the child's care. In Thomas v. Thomas, 233 Ill. App. 488, it was held that the fact that a mother was in contempt for disobedience of an order for visitation did not warrant a change in the order with respect to custody nor with respect to provision for support.

It is undoubtedly true that defendant was not in

prosperous circumstances and that he had some physical trouble. He was in the business of selling ties and he managed to earn some money. He paid \$90 to \$150 per month as rent. Recognizing his difficulties, it is still vital to society that even a poor man should be required to contribute to the support of his child. The order to pay the small amount of \$15 per week should not have been ignored by defendant. At the time he was apprehended by the sheriff on a writ of ne exeat he had \$80 in his possession, and at the time of the master's hearing, he had \$64. He should have given a portion of this to apply on his default.

On November 13, 1951 a petition to quash the writ of ne exeat was filed, and on November 14th the writ was quashed. The petition alleged that certain averments in the petition for the writ were untrue. The court, without giving plaintiff leave to answer the petition or to amend, if there were technical errors, entered an order quashing the writ. This was error.

The orders are reversed and the cause remanded, with directions to vacate the orders in question, to permit plaintiff to answer the petition of defendant to quash the writ of ne exeat, and to try the issues raised therein, and for such further proceedings as are consistent with the views herein expressed.

Orders reversed and cause remanded
with directions.

Robson, P.J., and Tuohy, J., concur.

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APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

At The October Term, A. D., 1952

Term No. 52-0-10.

Agenda No. 19.

MARY KERETIAN,	)	Appeal from the
Plaintiff-Appellee,	)	City Court
	)	of the City
vs.	)	of East St.
	)	Louis, St. Clair
ARMENAG ASADOURIAN and	)	County, Illinois
GUILNAZ ASADOURIAN,)	
Defendants-Appellants.)	

349 L.A. 390²

BARDENS, P. J.

Plaintiff, a woman eighty years of age, brought an action in the City Court of East St. Louis for personal injuries suffered while a social guest on the premises of the defendants. After all the evidence was in and the defendants had moved for a directed verdict, plaintiff's complaint was amended to charge wilful and wanton conduct rather than negligence on the part of the defendants. The jury returned a verdict in plaintiff's favor and assessed her damages in the amount of \$800.00. The usual post verdict motions were made and denied, and judgment was entered on the verdict. The defendants introduced no evidence and contend on this appeal that the trial court erred in denying their motions for a directed verdict and for judgment n.o.v. The issue presented on this appeal is whether the evidence viewed in its aspects most favorable to the plaintiff is

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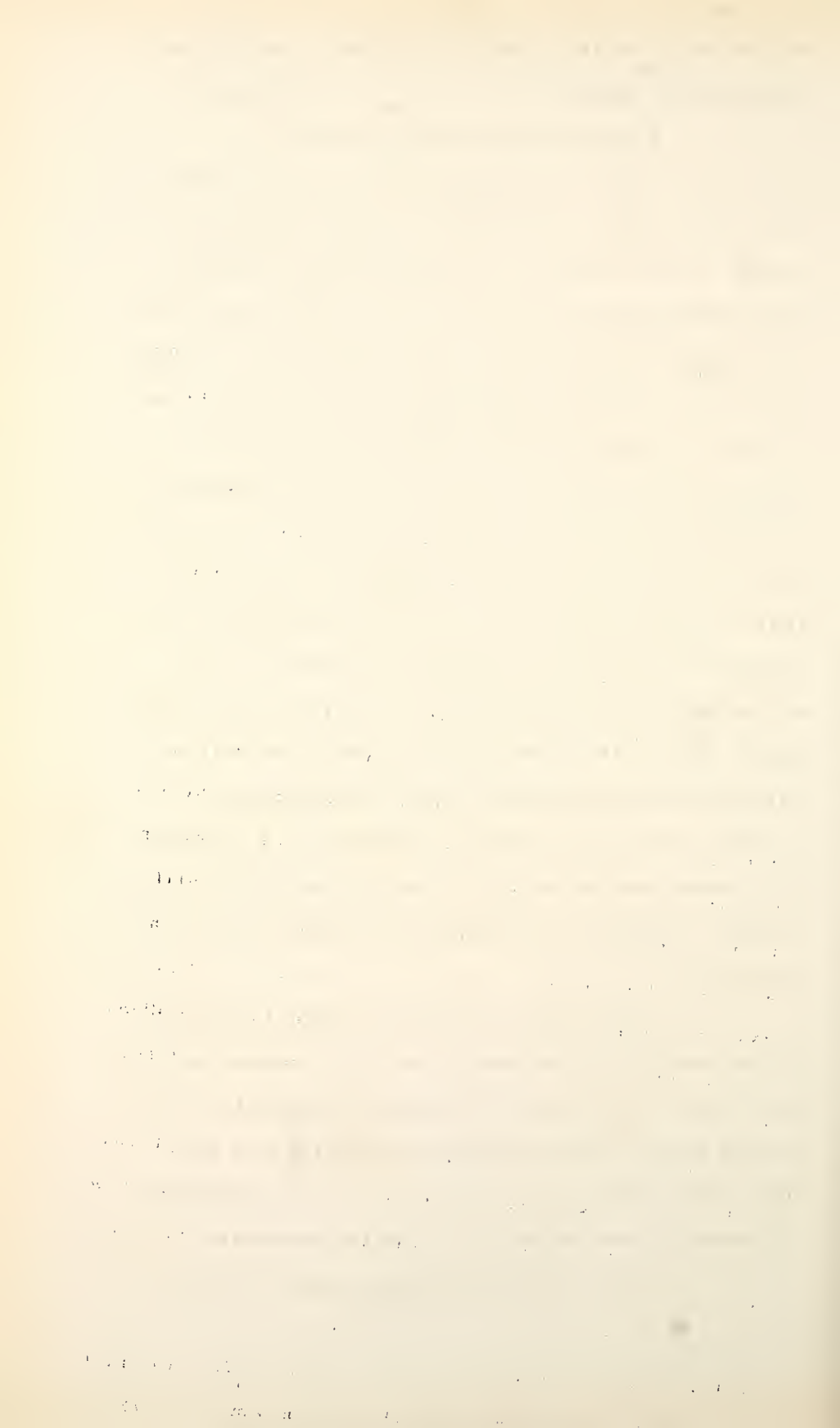
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sufficient to sustain the allegations of wilful and wanton misconduct on the part of the defendants.

The evidence established that the defendants invited the plaintiff to their second-floor apartment on New Year's Day, 1950, for a purely social occasion. Though she had visited the defendants' home on two prior occasions, she was unfamiliar with the room arrangement. About 7:00 p.m., after having dinner in the kitchen, the plaintiff got up from the table and said she was going to the bathroom. She testified that she did not know its location, having never had occasion to use it previously. The defendants told plaintiff that the bathroom was in the hallway but gave no specific directions or further assistance. The evidence further showed that the hallway was illuminated only by the light in the kitchen and that the bathroom door was at the end of the hall opposite a similar doorway leading downstairs. The plaintiff opened the latter door, stepped in and fell down a flight of stairs causing injuries which were not disputed.

The wilful and wanton conduct charged in the amended complaint is that the defendant failed to warn the plaintiff of the arrangement of the closed doors in the unlighted hallway, well knowing of the dangerous condition and the probability of injury to one unfamiliar with the premises.

It has been established under our law



that a social guest in a home is classified as a "licensee" and thus places his host under the duty to refrain from wilful and affirmative acts injurious to him. BIGGS v. BEAR, 320 Ill. App. 598. The plaintiff acknowledged this to be the law as to social guests and amended her complaint in accordance therewith during the course of the trial by replacing the allegation of negligence with the charge of wilful and wanton misconduct.

While the phrase, "wilful and wanton" is subject to frequent definition, it nonetheless remains a highly elusive and inexact concept of law. The Supreme Court of Illinois, in Bartolucci v. Falletti, 382 Ill. 168, made the following comments about the meaning of the phrase:

"Ill will is not a necessary element of a wanton act...An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others such as exhibits a conscious indifference to consequences makes a case of constructive or legal wilfulness. Streeter v. Humrichouse, 357 Ill. 234."

It is clear that the defendants' status as gratuitous and solicitous hosts militates against any conclusion that they intentionally disregarded a known duty necessary to the safety of the plaintiff or that they were consciously indifferent to consequences. While their directions were inexact and they may not have acted as reasonable persons under the circumstances, such conclusion does not establish a breach of the duty

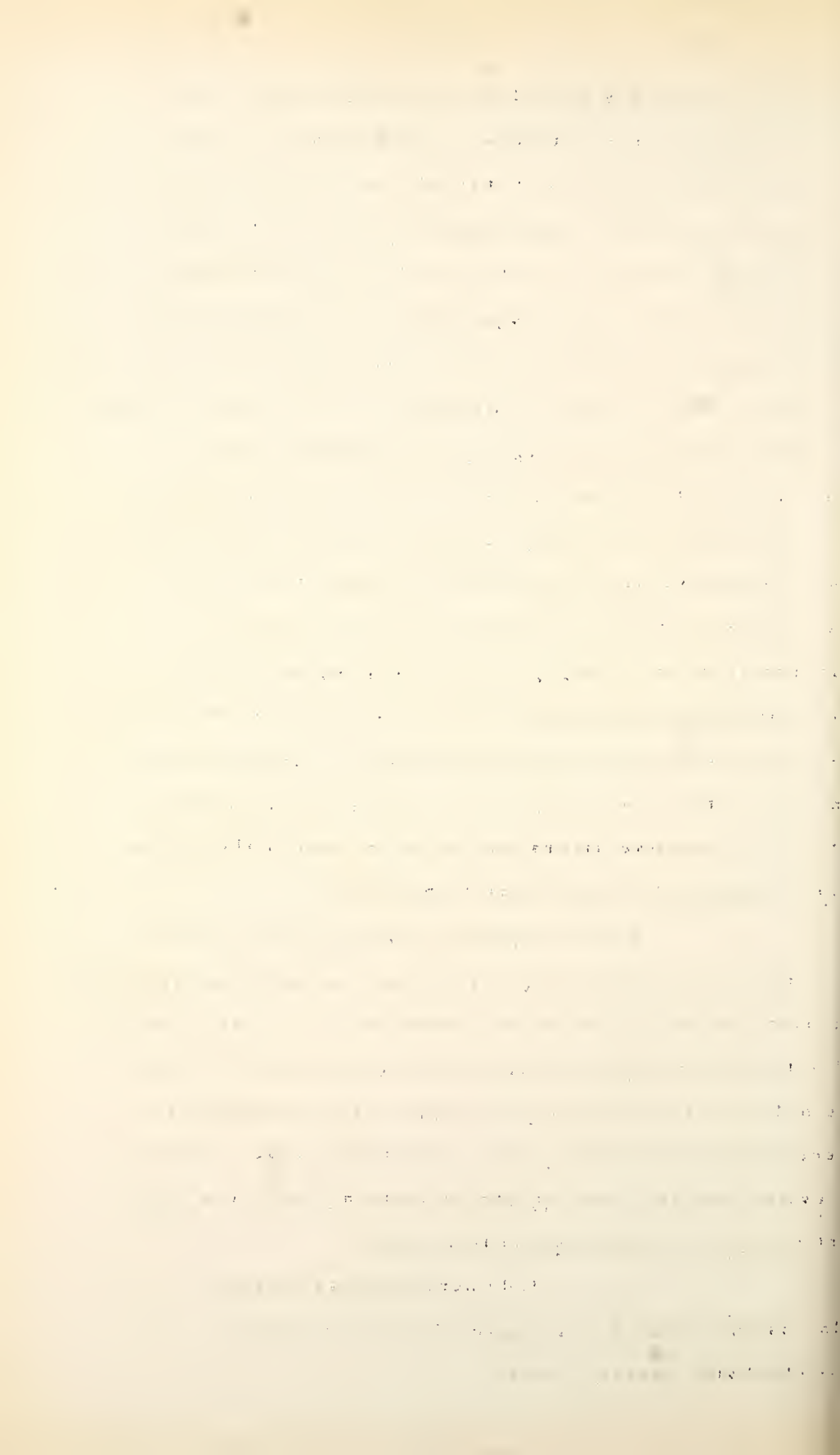
created by the purely social relationship a "conscious indifference to consequences" rests upon a knowledge of facts that would lead one to anticipate the consequences of his action or inaction. We do not find proof of such knowledge on the part of the defendants in the instant case. It was not established that the plaintiff inquired as to the location of the bathroom nor was it shown that the defendants knew that plaintiff was unfamiliar with its location. The plaintiff testified that she had not had occasion to use the bathroom on her two previous visits and that she did not know its location, but it is not a necessary or legitimate inference from such testimony that defendants were aware of such situation. Nor was there evidence that plaintiff did not know the location of the stairway door. The record is silent as to whether these stairs were used to reach the defendants' second-floor apartment.

Considering the testimony as a whole, we do not feel that the evidence viewed most strongly in plaintiff's favor has established a cause of action under the law governing these cases and we therefore hold that the trial court erred in failing to direct a verdict for the defendants at the close of the evidence and in denying their motion for judgment notwithstanding the verdict.

Judgment reversed.

Culbertson, J. and Scheineman, J. concur.

Publish abstract only.



APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

At The October Term, A. D. 1952

Term No. 52-0-13.

Agenda No. 6.

Modified Opinion

----- 349 I.A. 391

IN THE MATTER OF THE PETITION OF)
COMMON SCHOOL DISTRICT NO. 191)
TO ANNEX TO COMMUNITY UNIT)
SCHOOL DISTRICT NO. 187,)

JOE QUEVREUX et al.,)
Petitioners-Appellees.)

-v-)

JAMES UPCHURCH, LEO SAUGET,)
EARL MISCHKE, CORNELIUS)
CHAUDET and FRANK H. KAZILEK,)
Objectors-Appellants,)

and)

COMMUNITY UNIT SCHOOL DISTRICT)
NO. 187, ST. CLAIR COUNTY,)
ILLINOIS,)

Intervenor-Appellant.)

Appeal from
the Circuit
Court of
St. Clair County,
Illinois.

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David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

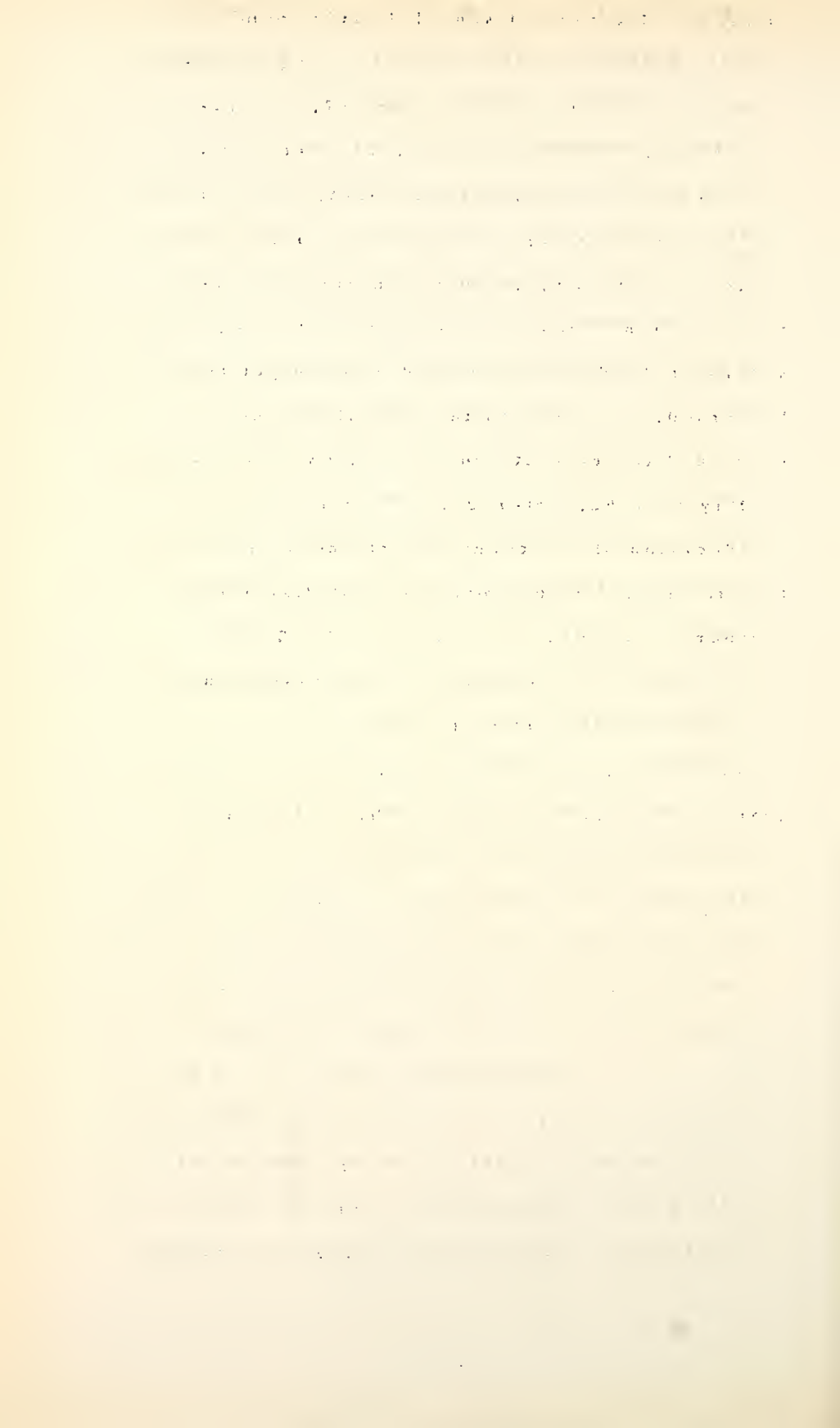
BARDENS, P. J.

This appeal involves a school district annexation proceeding under provisions of Sections 8-6 and 8-7 of the school code, Ill. Rev. Stat., 1949, Chapter 122, par. 8-6 and 8-7. These two sections were repealed by the legislature in 1951, the repeal to be effective July 1, 1952.

Proceedings were instituted by the filing in the county court of a petition purporting to bear the signatures of at least two-thirds

of the legal voters of school district number 191, a common school district, asking annexation to school district number 187, and adjoining community unit school district. Notice was given and hearing had in county court and the county court, on February 5, 1951, entered an order finding the petition did not contain the signatures of two-thirds of the legal voters of the district and ordered the petition be denied. Appeal was taken to the circuit court and the circuit court of St. Clair County on May 5, 1952, entered an order reversing the decision of the county court and ordering that the petition of common school district number 191 be granted and allowed. The objectors filed appeal from this decision and contend in this court that the circuit court exceeded its jurisdiction and passed upon matters that had not been passed upon by the county court in ordering the allowance of the prayer of the petition for annexation. Appellees contend that the statute makes the decision of the circuit court final and no appeal lies therefrom and that therefore our court has no jurisdiction.

We think the contentions can be disposed of quite readily under the authority of the People, ex rel Dolan vs. Dusher, 411 Ill. 535; Board of Education vs. Nickle, 410 Ill. 98; and the very recent case of Dolan vs. Whitney,



413 Ill. 274. In the last cited case the court had under consideration the identical sections involved in this case and held that in as much as these two sections of the school code were repealed as of July 1, 1952, all pending actions under the sections abate since no saving clause was provided. In as much as the lower court in the case at bar had, in the final order, gone beyond the authority of the statute, the appeal in this case was properly taken from the entire order. The whole case involved a pending procedure on appeal to this court at the time these sections of the act became repealed and therefore each and every order heretofore entered in the case is a nullity.

For the reasons assigned the appeal is dismissed.

Appeal dismissed.

Culbertson, J., and Scheineman, J., concur.

Publish abstract only.

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APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

FILED
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At The October Term, A. D. 1952

Term No. 52-0-13.

Agenda No. 6.

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

IN THE MATTER OF THE PETITION OF)
COMMON SCHOOL DISTRICT NO. 191)
TO ANNEX TO COMMUNITY UNIT)
SCHOOL DISTRICT NO. 187,)

JOE QUEVREAU et al.,)
Petitioners-Appellees,)

-v-

JAMES UPCHURCH, LEO SAUGET,)
EARL MISCHKE, CORNELIUS)
CHAUDET and FRANK H. KAZILEK,)
Objectors-Appellants,)

and)

COMMUNITY UNIT SCHOOL DISTRICT)
NO. 187, ST. CLAIR COUNTY,)
ILLINOIS,)
Intervenor-Appellant.)

) Appeal from
) the Circuit
) Court of
) St. Clair County,
) Illinois.

BARDENS, P. J.

This appeal involves a school district annexation proceeding under provisions of Sections 8-6 and 8-7 of the school code, Ill. Rev. Stat., 1949, Chapter 122, par. 8-6 and 8-7. These two sections were repealed by the legislature in 1951, the repeal to be effective July 1, 1952.

Proceedings were instituted by the filing in the county court of a petition purporting to bear the signatures of at least two-thirds

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and therefore each and every order heretofore entered in the case is a nullity.

For the reasons assigned the appeal is dismissed.

Appeal dismissed.

Culbertson, J., and Scheineman, J., concur.

Publish abstract only.

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APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

At The October Term, A. D., 1952

Term No. 52017.

Agenda No. 8.

----- 349 I.A. 392¹

MADGE TEAGUE,)
Plaintiff-Appellant,)
)
vs.)
)
TED HAZELWOOD,)
Defendant-Appellee.)

Appeal from the
Circuit Court
of Johnson County,
Illinois.

BARDENS, P. J.

Plaintiff, a pedestrian, brought an action for personal injuries in the Circuit Court of Johnson County based on the alleged negligence and wilful and wanton misconduct of the defendant in the operation of a truck on the public square in the City of Vienna. A jury found the issues for the defendant and in answer to a special interrogatory found that the plaintiff had been guilty of contributory negligence. Plaintiff's motion for a new trial was denied and she prosecutes this appeal solely on the ground that the court erred in giving the jury misleading and erroneous instructions on the defendant's behalf.

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The evidence establishes that the incident in question occurred on the east side of the courthouse square as the defendant proceeded north around the square. Plaintiff had parked her car in a parking stall at the curb nearest the courthouse on the east side of the square and had crossed the street to pay a bill. As she attempted to recross the street to her car, the accident occurred. Plaintiff and her 15 year old son testified that she was struck when she had reached a point just north of the rear of her car; defendant testified plaintiff stepped out from between two parked cars on the east side of the street, across the street from where her car was parked. Plaintiff further testified that she first saw the truck moving east on the street which is on the south side of the public square at a speed estimated to be 35 to 40 miles an hour; her son testified he saw the truck proceeding on the west side of the square at a speed of 40 miles per hour, which speed it maintained around the square to the point of impact. This testimony, as well as all other testimony on the material issues was in conflict with the testimony of the defendant who was the sole witness on his own behalf.

Eleven instructions were given on behalf of the plaintiff. The defendant tendered 23 instructions all of which were given by the court.

Instruction number 3 emphasizes that contributory wilful and wanton negligence will bar recovery even if the defendant is guilty of wilful and wanton negligence. Instruction number 15 is to the same effect except it covers ordinary negligence. Instruction number 12 pronounces that the statute provides that a pedestrian crossing at a point other than a marked crosswalk must yield the right of way to vehicles and calls attention to the claim of defendant that the plaintiff was crossing other than at a crosswalk and that the jury could find her guilty of contributory negligence. Number 6 tells the jury that if plaintiff was crossing other than at a marked crosswalk and in doing so was guilty of wilful and wanton conduct and that it was the proximate cause of the accident, she can not recover under count two. Number 9 is the same as 6 except applied to ordinary negligence under count one. Number 18 states that the defendant has a right to assume that the plaintiff as a pedestrian upon the highway would obey the Motor Vehicle laws. Instruction number 4 calls attention to the defendant's claim that the plaintiff stepped from between two parked vehicles into the path of the defendant's truck. Number 16 concerns the rule regarding sudden emergency and speaks of the evidence that plaintiff "suddenly walked from between two parked vehicles

into the path of the defendant's truck."

Number 20 again dwells on the evidence that plaintiff suddenly and unexpectedly walked from between parked cars in front of the defendant's approaching vehicle. Instruction 13 dwells on the duty of pedestrians using the street to keep a look out to ascertain, observe, and make reasonable and prudent effort to avoid collision. Number 14 states the duty of the plaintiff generally to use reasonable care to avoid injury. Number 19 states the duty of the plaintiff in crossing a street to look out for vehicles that might be using the street. The defendant submitted one special interrogatory and it was on the question of plaintiff's contributory negligence.

A review of these instructions as above pointed out shows that twelve of the twenty-three instructions directed the attention of the jury to the question of plaintiff's contributory negligence. We find also that twelve of the twenty-three instructions ended up with phraseology to the effect that defendant was not guilty or that plaintiff could not recover. Instruction number 2 was improper in that it singled out the question of personal injury and told the jury that evidence of plaintiff's injury did not of itself entitle plaintiff to recover. Instruction number 17 is argumentative in that it tells the jury

that the driver of a motor vehicle is not an insurer of the safety of pedestrians and that "all that is required" is the exercise of ordinary care.

As stated previously, the evidence was highly conflicting and irreconcilable. The undue prominence given to instructions on contributory negligence and the excessive repetition of phrases such as "not guilty" and "plaintiff cannot recover" constitute reversible error. *Lambert vs. Senne Funeral Home*, 343 Ill. App. 136, 144; 98 N. E. (2d) 519, 523; *Baker vs. Thompson*, 337 Ill. App. 327, 334; 85 N. E. (2d) 924, 927; *Chism vs. Decatur Newspapers, Inc.*, 340 Ill. App. 42, 48; 91 N. E. (2d) 114, 117. The case is close on the evidence and that distinguishes it from *Loucks vs. Pierce*, 341 Ill. App. 253; 93 N. E. (2d) 372.

We also are of the opinion that defendant was not justified in burdening the court with this many instructions in a case where the issues were relatively simple and which only required one day for the trial.

For these reasons the judgment of the lower court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Culbertson & Scheineman, J. J. concur.

Publish Abstract Only

3213

A

FILED
JAN 30 1953

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

David E. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

At The October Term, A. D., 1952

Term No. 52-0-23

Agenda No. 7.

ROBERT W. HALL,)
Plaintiff-Appellee,)
-v-)
MRS. JAMES FLAVIN,)
Defendant-Appellant.)

Appeal from
Circuit Court of
Madison County,
Illinois.

320 T.A. 302²

BARDENS, P. J.

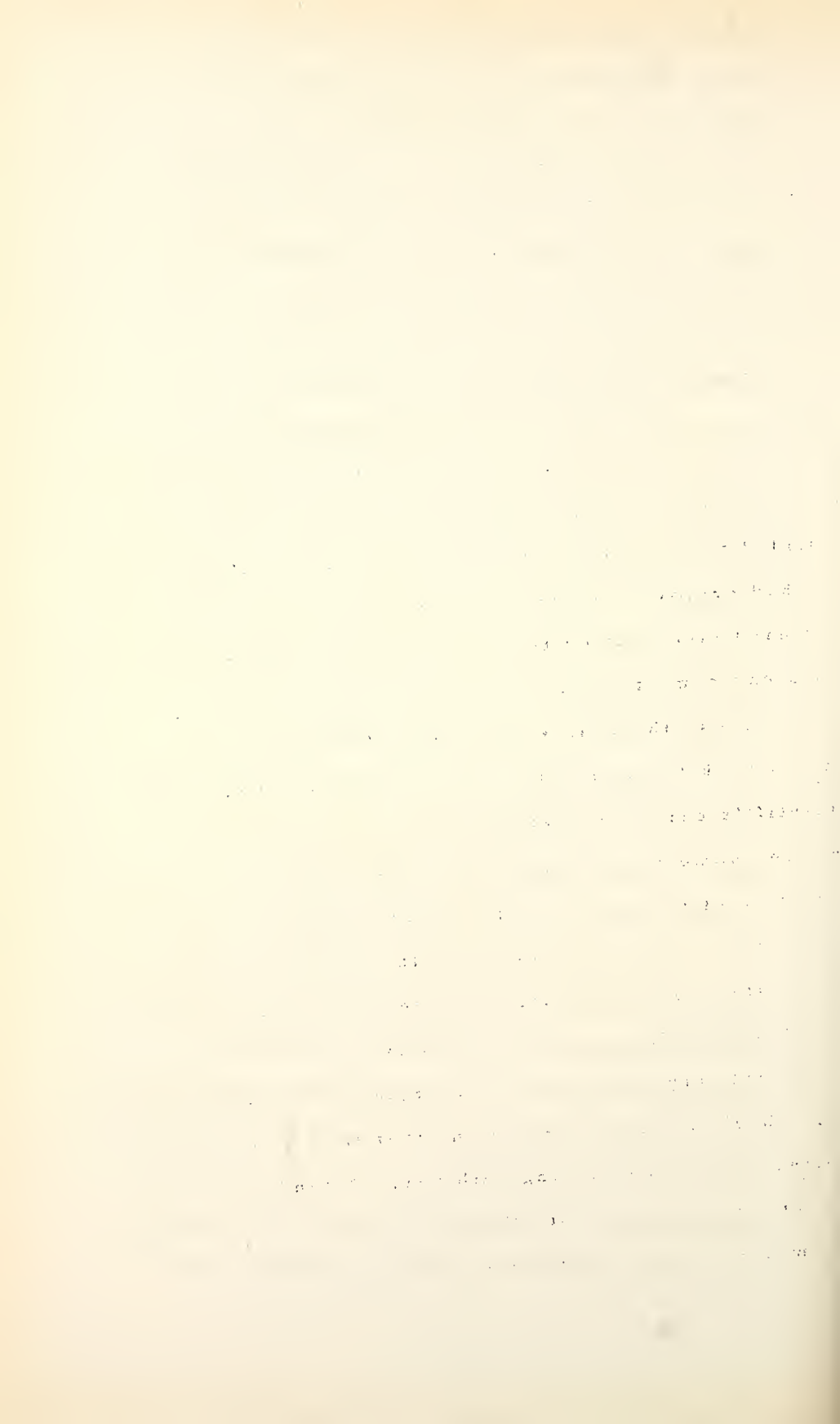
Plaintiff brought this action to recover for damage to his automobile resulting from a collision with a suburban Carryall owned and driven by the defendant, there being no personal injuries involved in the case. Trial was before a jury which returned a verdict in plaintiff's favor for the sum of \$670.17. The court required a remittitur which was filed and judgment was rendered for \$527.52, representing the actual repair bill on plaintiff's car. Defendant has argued that the verdict is against the manifest weight of the evidence and that there was error in the giving of two instructions. Thus it will be necessary for us to review the evidence.

The accident occurred on September 5, 1950, at approximately five P. M. Plaintiff was driving his car in a northerly direction on a road known as the Wood River--Bethalto road. This road leaves Illinois State Highway No. 159 and runs east and west for some time and then curves to the north. The road is a paved, two-lane, concrete highway. In leaving State Route 159 and after turning to the north, there is a hill, and upon reaching the top of this hill, the road proceeds in a northerly direction for some distance to an intersection with an oiled road where the collision in question occurred. At this point the road is not within any city limits, but there is a suburban subdivision served by it.

Plaintiff's testimony was that as he drove along the road in question, after reaching the top of the hill, he noticed in front of him about one-quarter of a mile ahead of him a Ford, and some distance ahead of the Ford was the car driven by the defendant; that these cars were going approximately twenty-five miles per hour and plaintiff was overtaking them; that when plaintiff was about 100 feet from the intersection of the oiled road, he pulled out to pass the Ford and increased his speed; as he pulled across the black line he sounded his horn and that he saw no signal for a left turn being given by the defend-

ant although he was in position to see one; that when plaintiff's car was alongside the defendant's car, defendant pulled to the left to make a left turn into the intersecting road and thus caused the collision between the cars, plaintiff's right front fender colliding with the left rear fender and left door of the defendant's car; at this time the plaintiff was traveling from sixty to seventy miles per hour; there was a car coming from the opposite direction which was not involved in the accident. Plaintiff testified that at the time the two cars collided the two front wheels of the defendant's car had crossed the centerline and were in the left hand lane. After the collision the defendant's car came to a stop with the left rear wheel across the center line, with the front wheels back to the right or east side of the road. Plaintiff's car went down the left shoulder, striking some mail boxes, and stopped about seventy feet northwest of the impact.

On behalf of the defendant there were three witnesses, including the defendant. The defendant testified that she was driving the suburban Carryall and was delivering newspapers on a suburban delivery route and that the witness Pauline Wadlow was riding with her. Defendant was intending to turn into the oiled road heretofore mentioned for the purpose of delivering



papers in the suburban subdivision. She stated that when about 300 feet south of the intersection she took her foot off the accelerator and coasted to a gradual stop. She observed in her rear view mirror the Ford car following her and when about 150 to 200 feet from the intersection, put out her hand to signify her intention to make a left turn; that her car came to a full stop or at least was going very slowly and that the car immediately behind her came to a stop eight or ten feet from her car; that she saw the car approaching from the opposite direction and intended to wait for that car to pass before proceeding with her left turn and that while waiting for that car, the car of the plaintiff came up and struck her and then went left, knocking down nine or ten mail boxes standing on the northwest corner of the intersection. She said she heard no signal and did not see plaintiff's car prior to the collision.

Mrs. Wadlow, the passenger in the defendant's car, in many respects corroborated the defendant's testimony, except as to certain details of speed and distances and except also that she saw two cars parked behind the defendant's car and that she observed plaintiff's car coming around the other two.

The third witness for the defendant, Jessie J. Lord, lived in the suburban subdivision

and was on his way to his mail box at the intersection and witnessed the collision. He testified that the defendant had her hand out signaling a left turn and that he noticed two parked cars behind her and that he saw the plaintiff, whose speed he estimated at from sixty to eighty miles per hour, strike the side of the defendant's car and knock down the mail boxes and come to rest in a hollow about 150 feet from the point of impact. This witness believed the defendant was standing still, but said that she had turned her wheels to the left to make a turn and if moving at all was just barely moving.

After the accident, all three of defendant's witnesses testified to a conversation in which plaintiff stated that he did not see defendant's hand signal for a left turn until it was too late and that he was going too fast. The plaintiff did not remember the conversation set forth but stated he did remember defendant saying that she "didn't know where the dickens plaintiff came from."

From a review of the testimony it is very apparent that there was highly conflicting evidence about the exact details prior to the time of the accident. The defendant strenuously insists that the verdict of the jury in plaintiff's

favor is against the clear manifest weight of the evidence and points out that the plaintiff was his only witness in the case, whereas the defendant's testimony was corroborated at least in part by other witnesses. In our opinion this is not the controlling factor in determining the weight of evidence, although it is a matter that should be given consideration. Where the evidence that is conflicting pertains particularly to some condition which is observable by a number of witnesses without the intervention of emotions, the upper courts have frequently reversed cases on the grounds of verdicts being against the manifest weight of the evidence. *Robertson v. Louisville N. R. Co.*, 327 Ill. App. 44, 63 N. E. (2d) 608; *Bell et al. v. Illinois Farm Supply Co. et al.*, 334 Ill. App. 216, 78 N. E. (2d) 838. When, as in this case, the matters and things being testified to all happened within a time interval lasting a few seconds at the most, the weight of the evidence is peculiarly within the province of the jury and the verdict should not be set aside on that ground, especially where the verdict has received the approval and confirmation of the trial court who had the same opportunity to hear and observe the witnesses as the jury did. The jury in this case evidently believed the plaintiff's testimony was entitled to more weight than the defendant's and

under the circumstances we can not say that the verdict was against the clear manifest weight of the evidence.

We are thus confronted with a situation very similar to the case of Hestand v. Clark, 345 Ill. App. 480, 103 N. E. (2) 652, where the evidence shows that both parties are guilty of some violation of a statute. We pointed out in that case that under these circumstances the legislature has put a heavier burden upon the person making the turn than upon the one passing, even though the passing was commenced within 100 feet of an intersection and we held that the question of proximate cause under these circumstances was for the trier of facts. In our opinion, the same reasoning applies to the facts in this case

The other assignments of error which were argued relate to two instructions given on behalf of the plaintiff, both of which referred to negligence alleged or charged "in the complaint." The issues in this case were simple and we feel that after the jury had been selected and heard the testimony and arguments of counsel that they could not possibly have been misled about what negligence was charged in the complaint and we adhere to our holding in this respect set out in Bertrand v. Adams, 344 Ill. App. 559, 565.

The last contention pertains to an instruct-

ion given on behalf of the plaintiff, the defendant maintaining that the instruction did not set up the proper standard of damages where the only claim is one for property damage and not for personal injury. In as much as the final judgment rendered was for the exact amount paid out by plaintiff for repairs to his car and there was no conflicting evidence regarding the amount of damages in this respect, we fail to see how the defendant could have been prejudiced by this particular instruction and find no reversible error in the giving of the same.

For the reasons indicated, the judgment of the lower court will be affirmed.

Judgment affirmed.

Culbertson, J., and Scheineman, J., concur.

Publish abstract only.

3773

FILED

JAN 30 1953

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

At The October Term, A.D. 1952

Term No. 52-0-29.

Agenda No. 15.

A

WILLIAM JONES,)
Plaintiff-Appellant,)
-v-)
MAURA PHILLIPS,)
Defendant-Appellee.)

Appeal from
the Circuit Court
of Madison County,
Illinois.

349 I.A. 393¹

BARDENS, P. J.

Plaintiff's personal injury action
alleging wilful and wanton misconduct by
defendant in driving a truck in which plaintiff
was a "guest" resulted in a jury verdict in the
sum of \$7,500.00. Defendant's motion for
judgment n.o.v. was thereupon granted. Plain-
tiff appeals from this order of the Circuit
Court of Madison County and the companion order
granting defendant's motion for a new trial in the
event the prior order is reversed on appeal.

On the morning of December 22, 1950,
plaintiff and defendant together with three fellow-

employees were riding in defendant's truck which had an enclosed body like a station wagon on their way to work at Wood River, Illinois. Defendant picked up plaintiff and another passenger in Litchfield at 6:30 A.M. and the other two men along the route. About 2 miles south of Hamel, on U. S. Route 66, the defendant overtook and passed in succession a station wagon and a Mercury which were traveling about 75 feet apart. Approaching these vehicles from the opposite direction was a large truck about 300 feet away from the Mercury. As the defendant began turning in from the passing lane his truck began to slide and ended up in a deep ditch on the right side of the road causing injuries to plaintiff that are not disputed. Plaintiff's allegation of wilful and wanton misconduct is based principally on the contention that the defendant drove at an excessive speed in view of the slippery and dangerous condition of the highway. Under settled principles of law we must consider plaintiff's evidence and reasonable inferences leading therefrom in support of such allegation of wilful and wanton misconduct as true and examine the record to determine whether under such assumption there is evidence to support the cause of action.

With respect to the normal condition

of U. S. Route 66, plaintiff's evidence was that it was a winding, black-top road 22 feet wide, badly chopped up and rutted. The accident occurred, however, where the highway is straight for approximately three-quarters of a mile. The highway was variously described by plaintiff's witnesses, his co-passengers and the drivers of the station wagon and Mercury, as "very icy," "covered with frozen frost," "very frosty and slippery," "slick with frozen frost," and "glazed, frost or ice." The witnesses were in accord that this condition existed for virtually the entire route that morning or at least along the entire six mile stretch of black-top that was travelled before the accident occurred. One of plaintiff's co-employees remarked to the defendant that the highway was slippery when he was picked up at Mt. Olive a half to three-quarters of an hour before the accident happened. The station wagon and the Mercury were proceeding at 30 to 35 miles per hour while defendant accelerated to 50 to 55 miles per hour in passing.

We are unable to say in the light of this evidence that all reasonable minds would conclude that defendant was not guilty of wilful and wanton misconduct. While the phrase "wilful and wanton misconduct" may not be susceptible of precise definition, it is clear that such conduct

must have about it certain qualities differing it from the inadvertence which characterizes negligence. There must be some unreasonable risk incident to an intentional act which would cause the ordinary reasonable man to perceive the extent of the risk and refrain from acting. It involves a consciousness of action and risk incident thereto of which the actor knows. Obviously the end result or harm need not have been intended. It is enough that the act causing the harm was intended.

Here defendant urges that the evidence shows that there was no prior slipping on the highway and that skidding by itself is not even evidence of negligence let alone wilful and wanton misconduct. But the skidding must be viewed in terms of the surrounding circumstances. In the instant case the jury had ample evidence on which to conclude: (1) that the highway was in a generally slippery and dangerous condition and that the accident was not the result of an isolated patch of ice; (2) that defendant had knowledge of these conditions; and (3) that defendant having such knowledge accelerated to 50 miles an hour to pass a car on a slippery highway with another vehicle approaching from the opposite direction.

The defendant next urges that the plaintiff cannot recover because he was guilty of wilful and wanton misconduct contributing to his injuries

in failing to object to defendant's conduct. There is some evidence that plaintiff was unable to observe the attendant circumstances from his position in the back seat of the truck behind the driver. This fact together with the swiftness of events affords some evidence to support the jury's implicit conclusion that an objection or warning on plaintiff's part was not to have been reasonably expected of a guest under such circumstances and that plaintiff was not therefore guilty of wilful and wanton contributory misconduct.

It is our conclusion therefore, in the light of the evidence most favorable to the plaintiff, that the issues drawn were matters of fact properly submitted to the jury and that it was error to render judgment for the defendant notwithstanding the verdict.

With respect to the order for a new trial, it is well settled that the trial court is allowed a broad discretion in such matters. *Loucks v. Pierce*, 341 Ill. App. 253, 93 N. E. 2d 372. Among the errors designated by the defendant in its motion for a new trial is the trial court's refusal to submit two special interrogatories to the jury, one on the question of plaintiff's contributory wilful and wanton misconduct and the other on the issue of whether defendant was guilty of wilful and wanton misconduct con-

tributing to the injury. Paragraph 65 of the Civil Practice Act (Chapt. 110, Sec. 189, Ill. Rev. Stat.) states that a jury "must be required on request of any party to the action to find specially on a material question of fact." While it is perhaps true, as the plaintiff contends, that these interrogatories simply put to the jury the issues raised by the pleadings and covered in the instructions, nonetheless the answers to these interrogatories would control the general verdict and they were therefore material and proper and, under the mandatory provision of section 65, should have been given. *Leonard v. Stone*, 381 Ill. 343, 45 N. E. 2d 620. Since the matter must be remanded to the Circuit Court of Madison County for a new trial we need not discuss the other errors urged in the motion for a new trial.

The order of the trial court granting defendant's motion for a judgment notwithstanding the verdict is reversed but the granting of a new trial is affirmed and the cause is remanded to the Circuit Court of Madison County for a new trial.

Reversed in part, affirmed in part and remanded for new trial.

Culbertson, J., and Scheineman, J., concur.

Publish abstract only.

3233

A

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED
JAN 30 1953

October Term, A. D. 1952

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 52-0-5

Agenda No. 3

J. E. LOGSDON,

Plaintiff and Appellee,

vs.

THE ALBERT DICKINSON COMPANY,
and JAMES JOSEPH ABELL,

Defendant and Appellant.

)
)
) Appeal from the
) Circuit Court
) of Gallatin
) County.
)

349 I.A. 393²

CULBERTSON, T

This is an appeal from a judgment of the Circuit Court of Gallatin County in favor of J. E. LOGSDON, Appellee (hereinafter called plaintiff), and as against THE ALBERT DICKINSON COMPANY, Appellant (hereinafter called defendant), in the sum of \$1098.28.

The action was instituted to recover damages for the sale of popcorn, which plaintiff contended he had sold to defendant acting through its agent, JAMES JOSEPH ABELL, who was also made a defendant. The evidence relating to the sale showed that on December 15, 1950, an agreement was made as between the parties, with defendant acting through the agent

referred to. The evidence for the plaintiff tended to establish a contract for the sale of the entire amount of popcorn available in the hands of plaintiff, to defendant. The defendants denied, specifically, that they had purchased the entire crop of plaintiff, but that they did purchase certain popcorn from plaintiff, for which they paid immediately upon delivery, and permitted the plaintiff, at plaintiff's request, to store a part of his popcorn in the cribs of the Dickinson Company until it could be sold. Deliveries of popcorn were made from time to time, and the evidence showed also that the agent of defendant Dickinson Company asked for an extension of time for payment and inquired if he could remove the popcorn in the crib of plaintiff, and there was also evidence that he conceded that the entire crop had been purchased.

There is a conflict of evidence on the basic issue as to whether there was a contract relating to the purchase of the entire crop, but the evidence appearing in the record on behalf of plaintiff tended to establish that such contract was, in fact, made. There was also evidence that some of the corn which had remained in the crib of plaintiff was sold by plaintiff at a loss of \$1254.25, and that the sale was made for the

purpose of cutting down the net loss which would have resulted if said popcorn had not been sold after defendant failed to take and pay for it.

The cause was tried by a jury and a verdict was returned in favor of plaintiff and as against the Dickinson Company. Sections 63 and 64, of the Uniform Sales Act, specifically provides that, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action as against the buyer for damages, and also that the seller may re-sell the goods to the best advantage and recover the difference between the selling price and the contract price (1951 ILLINOIS REVISED STATUTES, Chapter 121 1/2, Section 64; BAGLEY vs. FINDLAY, 82 Ill. 524). It is obvious that the action has been properly brought in the instant case as an action for damages for breach of contract.

On the issue as to whether or not there was a sale or contract as between the parties, the evidence was conflicting, and since the jury rendered a verdict in favor of plaintiff on the issue, this Court on appeal, cannot under the facts and evidence in the record, disturb such finding of the jury, in view of the fact that the verdict was not contrary to the manifest weight

of the evidence. The circumstance that the verdict was for a lesser sum than sought by plaintiff, is not the basis for reversal on appeal (H. W. FAULKNER & CO. vs. CENTRALIA BOTTLING WORKS, 234 Ill. App.9; DURHAM vs. EVANS, 56 Ill. App. 513).

On the questions raised as to the giving and refusing of instructions, we do not believe it is necessary to set forth such instructions at length in the opinion, but will simply observe that one instruction correctly stated the measure of damages for breach of contract to sell under the Uniform Sales Act, under the precedents in this State, and that the measure of damages was properly stated to be the difference between the contract price and the market price (BAGLEY vs. FINDLAY, supra; 1951 ILLINOIS REVISED STATES, Chapter 121 1/2, Sections 51, 64; NATIONAL LEAD CO. vs. MARTELL, 261 Ill. App. 332).

Another instruction which is complained of as invading the province of the jury was to the effect that if the jury found a contract existed, it could determine whether the contract was between plaintiff and the agent, individually, or if the agent had bound the Dickinson Company by his acts. Since the complaint alleged an alternative liability the instruction was apparently designed to establish the question of liability as between

the alternative defendants. The evidence supported a conclusion that defendant Abell was in fact the agent of the Dickinson Company for the purpose of buying and paying for popcorn on behalf of the Dickinson Company. Under the issues in the case there was nothing misleading or erroneous in the giving of such instruction with respect to agency (FOX RIVER DISTILLING CO. vs. ANDRICHIK, 175 Ill. App. 305).

One instruction refused, which was tendered by defendant, overlooked the fact that the basic issue was as to whether or not there was a contract as to the purchase of the entire crop and ignores the nature of the action for breach of contract and for damages. Since plaintiff could make his demand, receive back, and re-sell any corn redelivered, and likewise, re-sell corn which defendant had refused to take delivery on, such instruction was properly refused (MORRIS vs. WIBAUX, 159 Ill. 627; BAGLEY vs. FINDLAY, supra; 1951 ILLINOIS REVISED STATUTES, Chapter 121 1/2, Sections 64, 51).

Another instruction tendered by defendant required as a condition precedent for action for breach of contract, the consent and agreement of the party breaching the contract to the payment of damages. No such requirement is

imposed as a matter of law, as indicated by the cases cited in this opinion, and under the Sections of the Sales Act referred to herein.

There being no reversible error in the record, the judgment of the Circuit Court of Gallatin County is, therefore, affirmed.

Judgment affirmed.

Bardens, P. J., and Scheineman, J., concur.

Publish Abstract only.

3243

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED
JAN 30 1953

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, A. D. 1952

Term No. 52-0-15

Agenda No. 12

349 I.A. 394

MIKE CERTICH,)
)
Plaintiff-Appellee,) Appeal from the
) Circuit Court of
vs.) St. Clair County,
) Illinois.
JOHN GREGORICH,)
)
Defendant-Appellant.)

CULBERTSON, J.

This is an appeal by Defendant-Appellant, JOHN GREGORICH (hereinafter called defendant), from a judgment in the amount of \$3,000.00 obtained in the Circuit Court of St. Clair County, Illinois, by the Plaintiff-Appellee, MIKE CERTICH (hereinafter called plaintiff).

This is an action brought by plaintiff to recover damages for injuries sustained to the distal end of his little toe. It was alleged in the complaint that the injury was the result of the negligence of the defendant in permitting a piece of lumber to drop on the plaintiff's foot

on the 12th day of March, 1949, at which time the plaintiff and defendant were engaged in working together in the basement of a tavern owned by the defendant in Fairmont City. It appears that the structure housing the tavern and home of the defendant was a one-story frame building with a concrete basement under the tavern portion of the building and it was in this basement that plaintiff claims he was injured. From the evidence it appears that sometime prior to March 12, 1949, the defendant decided to enlarge his basement and had dug out a space large enough to serve as a coal bin. This excavation was outside of but adjacent to one of the walls. After the required area was dug out, the defendant took a sledge hammer and knocked down the concrete wall separating the basement proper from the addition thereto. The wall which was knocked down had served as a weight-bearing wall furnishing support to the floor of the tavern, and to prevent any sagging of the tavern floor, it was decided to install a new support in the nature of a wooden piece extending from beneath the floor joists of the tavern to the concrete floor of the basement. A temporary support was installed to serve until a permanent support could be installed later on. It was agreed by the parties hereto that the temporary

support was a wooden 3x4 and that a plate consisting of a piece of lumber about 3 1/2 feet long was placed beneath the floor joists and on top of the temporary upright support. This plate was placed at right angles to the floor joists and extended between two or more of the joists, the upright being placed in the center of the plate so that the finished product had the appearance of an elongated "T". On March 12, 1949, plaintiff brought his carpenter tools to the tavern of the defendant herein at about 10:00 o'clock in the morning for the purpose of installing a permanent support. Plaintiff secured a 4x5 piece of oak timber to be used as a permanent support and made the necessary measurements of the oak timber and then proceeded to saw the timber to the desired length. After the oak timber was cut it was found that the plaintiff had cut the timber about a quarter of an inch too long, and as to what happened after this timber had been cut and found to be a quarter of an inch too long presents a matter in which the plaintiff and defendant do not find themselves in agreement, as is reflected by the testimony in this case. Defendant testified that it was his suggestion to take a sledge hammer and wedge the oak timber into place. This suggestion was not

adopted by plaintiff.

Plaintiff testified that when it was discovered that he had cut the timber too long he decided to raise the hydraulic jack which was beneath the temporary 3x4 wooden support, enough to permit the defendant to set the oak timber into place. Plaintiff testified that when he began to jack up the temporary upright support, that the defendant was standing beside him holding the 4x5 oak timber and the 2x6 piece that was to serve as the plate across the permanent support, and that as he raised the jack, putting greater pressure on the temporary support, the 3x4 serving as the temporary support split with the increased pressure, causing the wooden plate that had been on top of the temporary support to fall and strike him on the foot, inflicting the injuries complained of.

The defendant testified that when it was discovered the oak timber had been cut too long that plaintiff selected a piece of 2x4 lumber to serve as an upright, and then rigged up three additional small pieces of 2x4 in the form of a rough "H", placing the top of the long piece of 2x4 against the cross-bar of the "H" and the bottom of the long piece of the 2x4 on a small automobile jack. The "H" arrangement of the smaller pieces of 2x4 was placed against the

floor joists. The defendant was attempting to hold the four pieces steady until the plaintiff was able to put sufficient pressure against the bottom of the longest of the upright pieces of 2x4, and that while he was holding these four pieces of lumber and while the plaintiff, Mike Certich, was applying pressure against the bottom of the upright piece of 2x4, the upright piece was caused to split, allowing the other three pieces to fall, one of which pieces hit the plaintiff on the foot, causing the injury. There were no other occurrence witnesses to the accident.

It is contended on this appeal that the Court erred in not directing a verdict for the defendant at the close of all the evidence, and having failed to do that, the Court erred in not entering a judgment notwithstanding the verdict. We have given very careful consideration to this assignment of error and believe under the evidence of this case that the Court did commit error in failing to direct a verdict for the defendant and in denying the motion for judgment notwithstanding the verdict, for the reason that it clearly appears that in the light of the evidence most favorable to plaintiff's case, he failed to prove any negligence on the part of defendant for which he should respond in damages, and it also clearly appears from the evidence that

plaintiff was guilty of contributory negligence that bars his right to recover. Applying the well-established law of this State, as same is set forth in CARROLL vs. N. Y. C. R.R. CO., 384 Ill. 599, 603, and GOODRICH vs. SPRAGUE, 376 Ill. 80, 87, in evaluating when a motion to direct a verdict for defendant should be allowed, we believe this case comes clearly within the rule announced, and the judgment of the Circuit Court of St. Clair County rendered in this case is, accordingly, hereby reversed.

Reversed.

Bardens, P. J., and Scheineman, J., concur.

Publish abstract only.

325.3

A

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED
JAN 30 1953

October Term, A. D. 1952

David P. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 52-0-20

Agenda No. 16

ANTON L. WESTRICH,)
)
Plaintiff-Appellee,)
)
vs.)
)
MARGARET V. WESTRICH,)
)
Defendant-Appellant.)

349 I.A. 395¹

Appeal from the
Circuit Court
of Madison
County.

CULBERTSON, J.

This is an appeal by MARGARET V. WESTRICH, Defendant-Appellant (herein- after called defendant) from a judgment enter- ed in favor of ANTON L. WESTRICH, Plaintiff- Appellee (hereinafter called plaintiff) on said plaintiff's motion for a summary judgment. This litigation was originally brought by plain- tiff in a Justice of the Peace Court to recover possession of certain premises from the defend- ant, described as 2232 Wycoff Street, Alton, Illinois. From a judgment awarding plaintiff possession of said premises the defendant appealed to the Circuit Court of Madison County, Illinois, where a summary judgment was entered

for plaintiff and against defendant for possession of said premises, and also for rent in the amount of \$1156.30.

An examination of the pleadings in this case discloses that plaintiff's motion for a summary judgment alleges that plaintiff brought this action to recover possession of certain premises which are therein described and of which plaintiff claims to be the owner and entitled to possession thereof, and which plaintiff contends defendant wrongfully withholds from him. The motion prayed for possession of said premises and also for a judgment against the defendant in the sum of \$932.50 for unlawfully withholding possession of the premises.

In support of plaintiff's motion and his theory that he is entitled to a summary judgment are certain affidavits. One of said affidavits was sworn to by plaintiff, Anton L. Westrich, wherein he alleged among other things, that he was the owner of the premises in dispute and entitled to possession of same and that defendant's only claim, right, or interest in the premises arose by virtue of a certain contract for deed which plaintiff contends was forfeited as a result of defendant's failure to comply with the terms thereof. Attached to said motion for a summary judgment was a copy of the

contract for deed hereinbefore referred to, and also an affidavit of one Francis Wayne Henderson, from whom plaintiff contends he purchased the premises in controversy, and there was also attached thereto a copy of a notice of forfeiture of said contract which plaintiff contends was sent to defendant by the said Francis Wayne Henderson on June 23, 1949.

In answer to plaintiff's motion for a summary judgment the defendant herein filed her counter-affidavit wherein she denied that she breached the terms and conditions of said contract for deed; denied that said contract was forfeited; and alleged that she had a full defense to this cause; and further, denied that she had been in default of the payments under said contract for more than sixty days, or for any period; and set forth that plaintiff had failed to comply with the statutory provisions of the Forcible Entry and Detainer statute regarding notice. Attached to defendant's counter-affidavit were three postal money order receipts payable to Wayne Henderson, the first two of which are dated June 24, 1949, and the third dated July 15, 1949.

An examination of the contract for deed attached to plaintiff's motion for a summary judgment discloses that on January 17,

1948 Francis Wayne Henderson (who is not a party to this suit), agreed to convey by Warranty Deed to George F. Westrich and Margaret V. Westrich (said Margaret V. Westrich being the defendant in this cause), certain real property located in Alton, Illinois, hereinbefore referred to, and that the said Westrichs agreed to pay Henderson the sum of \$4500.00 for said property, of which \$1,000.00 was paid at the time of the execution of the contract, and the balance payable in monthly installments of \$37.30. The monthly payments of \$37.30 were not to be paid to Henderson in full, but only \$22.00 of that amount was to be paid to Henderson by Mr. and Mrs. Westrich, commencing February 17, 1948, and on the 17th of each month thereafter until such time as either party was able to arrange a loan to liquidate the balance of the purchase price; and the remaining \$15.30 of each month's installment was to be paid directly by the Westriches to the Alton Building & Loan Association to liquidate the balance of a mortgage on said premises in favor of said Loan Association. Attached to plaintiff's motion for a summary judgment is a copy of the letter purportedly sent to the defendant and George F. Westrich on June 21, 1949 announcing that the seller, Francis Wayne Henderson, had elected

to forfeit the contract of sale. Plaintiff, by his affidavit, swears that he purchased the aforesaid premises on July 9, 1949, and that on August 23, 1949, he caused a demand for immediate possession to be served on defendant for possession of the premises, and on August 24, plaintiff brought a Forcible Entry and Detainer suit against defendant for possession. The affidavit of Francis Wayne Henderson attached to the motion for a summary judgment alleged the sale of the premises by him to Mr. and Mrs. Westrich and alleged the default by the defendant for non-payment of the monthly installments.

On February 29, 1952 the Circuit Court entered an order for a summary judgment in favor of plaintiff for possession of said premises and for 31 months rent, in the total amount of \$1156.30. On March 18, 1952 defendant filed a motion to vacate the order for a summary judgment, which motion was heard by the Court on June 6, 1952 and denied, and judgment entered in accordance with the order of February 29, 1952. This appeal follows.

It is urged on this appeal that the provisions of Paragraph 181, Chapter 110, 1951 ILLINOIS REVISED STATUTES, and Supreme Court Rule 15, considered in connection therewith, have not been complied with in this case.

A reference to the pertinent statute discloses that it provides that in any action to recover possession of land, with or without rent, the claimant shall file an affidavit or affidavits on the affiant's personal knowledge of the truth of the facts upon which the complaint is based and the amount claimed, and Rule 15 provides that an affidavit in support of a motion by plaintiff for a summary judgment shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.

We have subjected the affidavit of plaintiff to close and careful scrutiny and we do not believe it meets the requirements of the law as hereinbefore set forth, and that it does not contain positive allegations of default in the contract, but simply assumes a default and avers it by way of recital. No where does it appear, despite the positive mandate contained in Rule 15, that if sworn as a witness, that the plaintiff could competently testify to the contents of said affidavit. Before a motion for a summary judgment can be allowed, the right of the moving party to have same must be clear and free from doubt (BARKHAUSEN vs. NAUGHER, 395 Ill. 562). We do not believe the motion for a summary judgment should have been allowed in this case and that the entry of same constitutes reversible error. We do not find any basis for

the money judgment in this case under the record before us.

It is, therefore, the judgment of this Court that this cause be and the same is hereby reversed and remanded to the Circuit Court of Madison County, Illinois, for such further proceedings as the parties litigant desire to take, consistent with the views expressed in this opinion.

Reversed and remanded, with directions.

Bardens, P. J., and Scheineman, J., concur.

Publish Abstract only.

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In the

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

APPELLATE COURT OF ILLINOIS

Fourth District

October Term 1952

Jimmie L. Hall and Ruth I. Hall,
Plaintiffs-Appellees.
vs.

Appeal from the
City Court of
Granite City,
Illinois.

Sisto Bertacchi,
Defendant-Appellant.

349 I.A. 395²

Honorable Wesley Lueders, Judge Presiding.

Scheineman, J.

The plaintiffs, Jimmie L. Hall and Ruth I. Hall, purchased a house for residence purposes from the defendant, Sisto Bertacchi. After they moved in they were beset by various troubles. In the fall water leaked through the basement walls, and later when the furnace was operated, boards warped, the roof sagged, some shingles cracked and fell off, and a girder under a floor also sagged, the windows stuck, etc.

Plaintiffs brought suit against defendant, and a jury returned a verdict finding the issues for plaintiffs and assessing damages at \$2500 upon which judgment was entered.

On this appeal, defendant makes no attack on instructions or other procedure, but asserts that there has not been shown any basis to hold him legally liable for defects which developed in the house after he sold it.

The plaintiffs do not appear to contend that, in a simple contract for purchase and sale of a property, there exists an implied warranty by the vendor against the subsequent development of defects. Their theory seems to be based partly on the fact that defendant was engaged in the business of building residences, but the principle reliance is placed on an alleged express warranty made verbally by defendant.

The facts relied upon by plaintiffs are these: the defendant had built a group of six houses, one of which was occupied by a family named Bittner. Plaintiffs visited the Bittner home and liked its arrangement, so they enquired of defendant whether he would sell them one of the other houses. He replied they were already sold, but he was going to build some more on Jerden Avenue.

Mr. Hall testifies: "I said we were looking for a house and after he got them up, we would come back and look at them. He said the houses would be on the same floor plan and built of the same kind of stuff as Bittners'. The only difference would be a little difference in the entrance to the front, to keep them looking different. He said they would be built the same as the others and out of the same

materials."

Mrs. Hall was present at this conversation. Her testimony is merely that defendant said the houses he was going to build would be identical to the Bittner house.

The foregoing is the sum total of plaintiffs' evidence of the existence of a contract of express warranty. We have some difficulty in perceiving wherein this conversation created a contract of any kind. It seems that defendant merely stated an intention to do something in the future, with no promise or undertaking of any kind. If he changed his mind and decided not to build another house, or to build it according to entirely different specifications, would plaintiffs have a right to sue for breach of contract? We can find no legal basis for such claim, and plaintiffs suggest none.

Plaintiffs' counsel make some reference to the implied warranties which the law raises in building contracts. This is irrelevant to the case before us. It is true that defendant had the occupation of building contractor, but there is no possible basis in the evidence to assert he bore such a legal relation to plaintiffs.

The subsequent events were that defendant built a house on Jerden Avenue. Plaintiffs saw it during construction, and after it was up they were in it before it was plastered and again after the plastering. Their only further contact with defendant was to enquire about the price. He declined to

name any, but referred them to a realty company. They went to the company, agreed upon a price and signed a purchase agreement which did not contain a word about specifications.

Plaintiffs counsel do not argue the point, but there appears to be a tacit assumption that the conversation of the previous year has become a binding contract by reason of the later dealings. Assuming this can be the law of the case, we find no evidence of any breach. The statement made by the defendant the previous year was merely that the house would be built of the same "stuff" or materials as the Bittner house.

Plaintiffs offered no evidence that it was not so built. It is claimed that the lumber market was tight, and that defendant bought materials from truckers. The brief admits there is no evidence of the source of any material in the house.

Defendant brought his crew as witnesses, consisting of carpenters, masons, cement men, and others, nine in all. They all testified that this house was built the same way and of the same materials as the other houses and they did the work. Their evidence stands uncontradicted.

The basement wall was of concrete blocks. Part of it fell down during construction and was rebuilt. There is some dispute over the cause, whether it was hit by a bull-dozer, or yielded under pressure of wet gumbo soil.

It does seem likely that the trouble arose from dampness, probably from the water seeping through the concrete blocks, which caused other swelling, warping and resultant cracks. The plaintiffs recognized this, and produced a witness who testified that the proper way to build a concrete block foundation was to coat its exterior with a waterproofing material. Neither he nor plaintiffs could say whether that system was used in any other house built by defendant. In fact, no witness for plaintiffs testified to knowledge of any difference in materials or construction of this house as compared to the other houses.

It must be concluded that the existence of an express warranty is doubtful, but if the statements attributed to defendant constitute an express warranty, as relied on by plaintiffs, there was no evidence from which the jury could find a breach of warranty. The judgment is reversed.

Judgment Reversed.

Bardens, P. J. and Culbertson, J. concur.

Publish abstract only.

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David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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In The

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APPELLATE COURT OF ILLINOIS

Fourth District

David G. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, 1952.

349 I.A. 396¹

WILLIAM TERRY,)
Plaintiff-Appellant,)
-vs.-)
STEVE HEARNS and LYDIA HEARNS,)
Defendants-Appellees.)

Appeal from the
Circuit Court of
St. Clair County,
Illinois.

Hon. William G. Juergens, Judge Presiding.

Scheineman, J.

The plaintiff, William Terry, filed a complaint for partition of real estate. Certain real estate was described, alleged to be owned by plaintiff. It is further alleged that defendants claim some interest in adjoining real estate, and that they occupy a house which is partly upon each of the separately owned tracts. There is no claim of joint tenancy, tenancy in common, or other common ownership in the described real estate. On the contrary, it is specifically alleged that defendants have no rights in the land or the part of the improvement thereon. Nevertheless, the complaint prayed for partition in the usual form, asking for commissioners, etc.

The defendants answered, denying the right to the relief prayed for, and further asserting an adverse claim to the whole of the premises described in the complaint, which they occupied. There had been a tax foreclosure by the county, which deeded the property to the plaintiff, but he had never been able to secure possession.

The cause was referred to a master, who reported the evidence and some anomalous findings. One paragraph found that defendants owned some adjoining land, but that plaintiff was the sole owner of the property described in the complaint; also, that defendants had no interest in the described land or the portion of the improvements thereon. Another paragraph found that the same property "is the only real estate owned in common by the plaintiff and the defendants." There followed recommendations for appointment of commissioners, and sale, etc.

Exceptions to the master's report were partly sustained, the chancellor finding that the house was the sole property of the defendants, but leaving undisturbed the finding that the land described in the complaint was owned by plaintiff alone. No directions for further proceedings were given. There was no appeal from that order, and its propriety or correctness are not before this court.

More than two years after the entry of the foregoing order, the court entered a decree finding that plaintiff was the sole owner of the land, but that

defendants owned "part of the house and improvements thereon." Commissioners were appointed, with directions for division or sale, etc. There was nothing to indicate how the commissioners should divide plaintiff's land, nor any direction to appraise any improvement, or part thereof, separate from the land

Thereafter, the defendants filed a motion setting up that the complaint had stated no cause of action, that on these proceedings the decree was null and void, and asking that it be set aside, and suit dismissed. The plaintiff did not ask leave to amend, and defendants' motion was allowed, the decree set aside and the suit dismissed for want of equity. Plaintiff perfected this appeal. The order does not alter or define any existing title, hence no freehold is involved.

The only assignment of error is that the court erred in its last order, since plaintiff had established a case "for equitable relief through partition."

We are obliged to rule against plaintiff, for the reason that there is not now, and never has been in this state, a proceeding for the "partition" of land owned solely by one party. There must be a common ownership, not a several ownership of separate tracts. *McConnell v. Kibbe*, 43 Ill. 12; *Reynolds v. McCurry*, 100 Ill., 356; *Stevenson v. Bachrach*, 170 Ill., 253; *Wilson v. Hiligoss*, 278 Ill. App., 564.

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF THE HISTORY OF ARTS
AND ARCHITECTURE

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The case of Stevenson v. Bachrach, 170 Ill , 253, involved facts comparable to those before us. All the foregoing cases hold that the absence of common ownership is fatal to a complaint for partition; that such a complaint, showing on its face a claim of sole ownership, does not state a cause of action; and that a decree for partition of lands owned solely by one party is null and void. Appellant cites nothing in the Partition Act or the Practice Act, or otherwise, to change the rule.

It was proper for the court to set aside its void decree and to dismiss the complaint for want of equity. The order is affirmed.

Order affirmed.

Bardens, P. J. and Culbertson, J. concur.

Publish abstract only.

FILED
JAN 30 1953

JAN 30 1953

David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Appeal from the

Circuit Court of

Williamson County,

Illinois

Defendant-Appellant.

349 I.A. 396

Scheineman, J.

The plaintiffs suffered injuries in an accident while riding with the defendant as guests, and brought this suit charging that defendant was guilty of wilful and wanton misconduct. A jury found the defendant guilty, and also returned a special verdict in response to an interrogatory, that defendant was guilty of wilful and wanton misconduct. Damages were assessed at \$3500 for each plaintiff, upon which judgments were entered, and this appeal followed.

It is not contended that the verdicts were against the manifest weight of the evidence, but, for other reasons, we deem it necessary to indicate its substance.

The three persons involved met at a tavern about 9:00 P. M. While there is no claim of intoxication, it appears that during the ensuing

SPERMATOPHYTES

1. Ginkgo

2.

3. Pinus

4.

5. Juniper

6. Taxus

7. Cedrus

8.

9. Liquidambar

10. Fraxinus

11. Quercus

12. Alnus

13. Corylus

14. Betula

15. Populus

16. Salix

17. Ulmus

18. Liriodendron

19. Magnolia

20. Laurus

21. Sassafras

22. Eucalyptus

23. Eucalyptus

24. Eucalyptus

25. Eucalyptus

26. Eucalyptus

27. Eucalyptus

two hours they stopped at two other taverns, though the drinking was reported as moderate, then stopped at a restaurant and had something to eat.

The testimony of the girls presents the following: They left the restaurant in Herrin, intending to return to the tavern in Colp to retrieve the girls' car. At first, the defendant drove very slowly, so slowly that he impeded traffic, cars behind them had to come almost to a stop before going around them. One of the girls said "Cut it out" and the defendant then changed to high speed, estimated at seventy, slowed some for a curve, but crossed a railroad at such speed one of the girls bumped her head, then on a straight road he drove at 70 to 75 miles per hour. One of the girls again said "cut it out", or words to that effect.

Next, the defendant proceeded to swerve the car from one side of the pavement to the other. One of the girls screamed, the car went too far to the right, the right wheels dropping off the pavement at a place where the shoulder was low, then proceeded in that manner, without reducing speed, for a distance estimated at 150 feet, to a place where a gravel drive led off to the right, where it seemed the defendant attempted to turn back onto the pavement. The car turned over and rolled, making two or three complete rolls before it stopped, but the occupants were thrown out.

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are in agreement with the experimental facts.

In the second part of the paper, the author discusses the question of the structure of the nucleus. It is shown that the structure of the nucleus is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are in agreement with the experimental facts.

The third part of the paper is devoted to a discussion of the question of the structure of the molecule. It is shown that the structure of the molecule is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are in agreement with the experimental facts.

In the fourth part of the paper, the author discusses the question of the structure of the crystal. It is shown that the structure of the crystal is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are in agreement with the experimental facts.

The fifth part of the paper is devoted to a discussion of the question of the structure of the solid. It is shown that the structure of the solid is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are in agreement with the experimental facts.

The defendant testified that he had driven slowly at first, about ten miles per hour because the pavement was rough at that place, that he was urged to hurry, so he speeded up, but did not go faster than 50 or 55 miles per hour, did not zigzag, met a car which crowded him partly off the pavement, he hit a soft spot at the driveway and lost a defective rear wheel, causing the car to roll over two, possibly three times.

A witness named Caliper riding with a friend, saw a cloud of dust ahead, and told his companion there had been a wreck, and to slow down, they stopped at the scene, and the driver went for an ambulance, while Mr. Caliper stayed at the scene. He found one of the girls (Propes) sitting on the pavement, bleeding, but conscious. Defendant was looking under the car, apparently seeking the other girl. Witness joined in the search, but without success. About five minutes later, another motorist stopped and produced a flashlight. After further search, they found the other girl (Clark) unconscious, lying in a ditch, her head in water, at a point about 35 feet from the pavement. There is other corroboration for his testimony.

This witness examined the terrain and found the wheel marks where the car had traveled about 150 feet partly on the shoulder, found marks indicating where an attempt had been made to turn

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is divided into two main sections: the first section deals with the general situation of the country and the progress of the work during the year, and the second section deals with the specific results of the work.

2. The second part of the report deals with the specific results of the work. It is divided into three main sections: the first section deals with the results of the work in the field of agriculture, the second section deals with the results of the work in the field of industry, and the third section deals with the results of the work in the field of commerce.

3. The third part of the report deals with the conclusions of the work. It is divided into two main sections: the first section deals with the conclusions of the work in the field of agriculture, and the second section deals with the conclusions of the work in the field of industry and commerce.

4. The fourth part of the report deals with the recommendations of the work. It is divided into two main sections: the first section deals with the recommendations of the work in the field of agriculture, and the second section deals with the recommendations of the work in the field of industry and commerce.

5. The fifth part of the report deals with the summary of the work. It is divided into two main sections: the first section deals with the summary of the work in the field of agriculture, and the second section deals with the summary of the work in the field of industry and commerce.

back onto the slab, also marks indicating the car rolled over two or three times. It was standing 100 to 200 feet from the gravel driveway, missing both doors and the right rear wheel, the top and trunk mashed down.

Plaintiff Propes also testified that right after the accident, defendant cautioned her "Remember there was another car run us off the road, that's what we will say." She agreed because she thought he might be "in trouble". The defendant denies this episode.

The witness Caliper did not recall meeting another car at or shortly before the time of the accident. Neither did his companion, and he did not believe there was any.

An investigator for the insurance company called on plaintiffs (they were sisters) at their mother's home some time after they were out of the hospital, and wrote down purported statements which they signed. These statements were used for impeachment. In general, the statements were to the effect that defendant had been driving in a careful and safe manner, and had been crowded off the road by another car. Both statements contained detailed descriptions of plaintiffs' injuries, and there was evidence plaintiffs had been told the statements were needed only because the company was going to pay their medical expenses.

A significant item in the statements is that while the investigator recorded that another car had forced defendant off the slab, there were statements by both girls that they had not seen any such car. To this extent, the statements do not impeach, but conform to the testimony that this was something plaintiffs had been told.

Objection was made to some of the cross-examination of the investigator. Plaintiffs' counsel several times put questions which were misleading and unfair. Objections by defense counsel were sustained by the court.

This accident had happened shortly after 11:00 P. M. The defense produced a witness who testified that he had met a car about a quarter of a mile or more from the place of the accident, which car had crowded him and made him mad. He said this was about midnight. He made other conflicting statements as to time. The court ruled this out as too remote, and error is assigned on the ruling.

The witness had no means of knowing whether this car that he met had passed the defendant's car before or after the accident, nor what it did more than a quarter of a mile from his place of observation, and his time statements did not fit the picture.

The ruling was correct. It is the province of a trial judge to pass upon the relevancy of

collateral matters. If evidence offered is so remote that it does not appear to have an obvious tendency to elucidate the question in dispute, it should be rejected. Gardner v. Meeker 169 Ill. 40, 44.

The defense most strongly urges as ground for reversal the fact that plaintiffs' counsel used improper and prejudicial argument to the jury. In his first closing argument, the attorney spoke about scars borne by a plaintiff, and asked the jurors "Would you want those scars on you? Would you want those scars on you?" The statement was repeated five times, was interrupted by defense objection, which was sustained and the jury admonished by the court to disregard the improper remarks.

It has been held reversible error to appeal to a jury to put themselves in the place of plaintiff. Goad v. Grissom, 324 Ill. App. 123; Williams v. Norman, 347 Ill. App. 181.

In his final argument, plaintiffs' counsel criticized the investigator who obtained statements from the girls, for not advising them of their rights, or enquiring whether they had an attorney. He then argued that lawyers commonly advise clients not to make statements, and asserted that was his custom, and that defendant's attorney had often done the same thing. The court sustained an objection and told the jury to disregard comments on what the attorney did in other cases.

Later, it was asserted that defendant's attorney would not have used such tactics. Objection was again sustained and the jury admonished. Reference was also made to the fact that the defense had discussed and minimized the injuries and damages, then followed the comment: "He is expecting you to find a verdict --". Objection was sustained and the jury admonished.

It is highly improper to go outside the evidence and make comments on the attorney's personal experiences and what they did or would do. Appel v. Chicago Ry. Co. 259 Ill. 561; Trainer v. Baker, 195 Ill. App. 216. And of course, counsel have a right to discuss the question of damages without thereby admitting liability, and opposing counsel has no right to assert the contrary.

It is apparent that plaintiff's counsel did use improper argument. Moreover, when the court ruled against him, he did not withdraw his remarks, or offer any apology. Such conduct is not approved, but the question for this court to decide is whether the trial court abused its discretion in denying a motion for a mistrial, and erred in denying the motion for a new trial.

There is such a vast number of precedents on this subject, it would serve no purpose to attempt to digest them herein. There are many cases which hold that failure to object to improper argument is a waiver of the point. The

very purpose of requiring an objection is to afford an opportunity to the trial court to make a ruling, and to admonish the jury, thereby obviating the error. Numerous cases have ruled that by such action the error was cured. On the other hand there are cases in which it is held the action taken is not sufficient, and that a motion for a mistrial should have been allowed.

In the four instances in this case, the court promptly sustained objections, and each time admonished the jury to disregard the improper remark. Generally, the trial court is allowed some discretion in determining whether his rulings and action have been sufficient. *Eilers v. Peoria Ry. Co.* 200 Ill. App. 487.

In those cases in which the rulings were held not sufficient to cure the improper argument, there appears usually some other factor requiring reversal. There may have been other serious errors, as in *Williams v. Norman*, 347 Ill. App. 181, recently decided in this court. There are cases in which the size of the verdict indicates passion and prejudice resulting from the improprieties. Then there is the class of cases in which the reviewing court finds that the evidence presents a very close case, or that the successful party has a weak or doubtful case.

It may be assumed that the granting

of a motion for mistrial, or for new trial, would have been sustained in this case. On the other hand this cannot be classified as a close or doubtful case. The evidence was such that the trial judge would be justified in finding that another trial would not promote justice, or be likely to result differently. And apart from the items mentioned, the record in this case is free from error to an unusual degree.

Nor can it be said that the verdicts were excessive. It is true that the medical expense was only a few hundred dollars. But the plaintiff, Clark, besides cuts and severe bruises, suffered a compound fracture of the jaw, and wore a metal brace with her teeth wired to it and her jaws wired together for four weeks. The other plaintiff, Propes, had no fractures, but her injuries were not trivial. She had cuts requiring sutures, severe bruises, was in the hospital for eight days, could not walk for a month, and was left with scars, one on her forehead, and long, jagged and discolored scars on her legs. Medical testimony was that the scars were permanent. In view of the nature of the injuries, the attendant pain and suffering, hospitalization, loss of time, and other elements, the verdicts are within the reasonable scope of the evidence.

Some objection is made that the court refused proper instructions tendered by defendant.

The court gave 18 instructions at defendant's request. They adequately covered all phases of the case, including matters in the refused instructions. When more than one instruction on the same subject is tendered, a party will not be heard to complain that the court might have selected one more favorable to him.

We conclude that the errors assigned do not require reversal, and the judgments are affirmed.

Judgments Affirmed

Bardens, P. J. and Culbertson, J., concur.

Publish Abstract only.

45743

SEBASTIAN PARRILLI,

Appellee,

v.

ST. LOUIS BATH HOUSE CORPORATION,

Appellant.

349 I.A. 397

APPEAL FROM

SUPERIOR COURT,

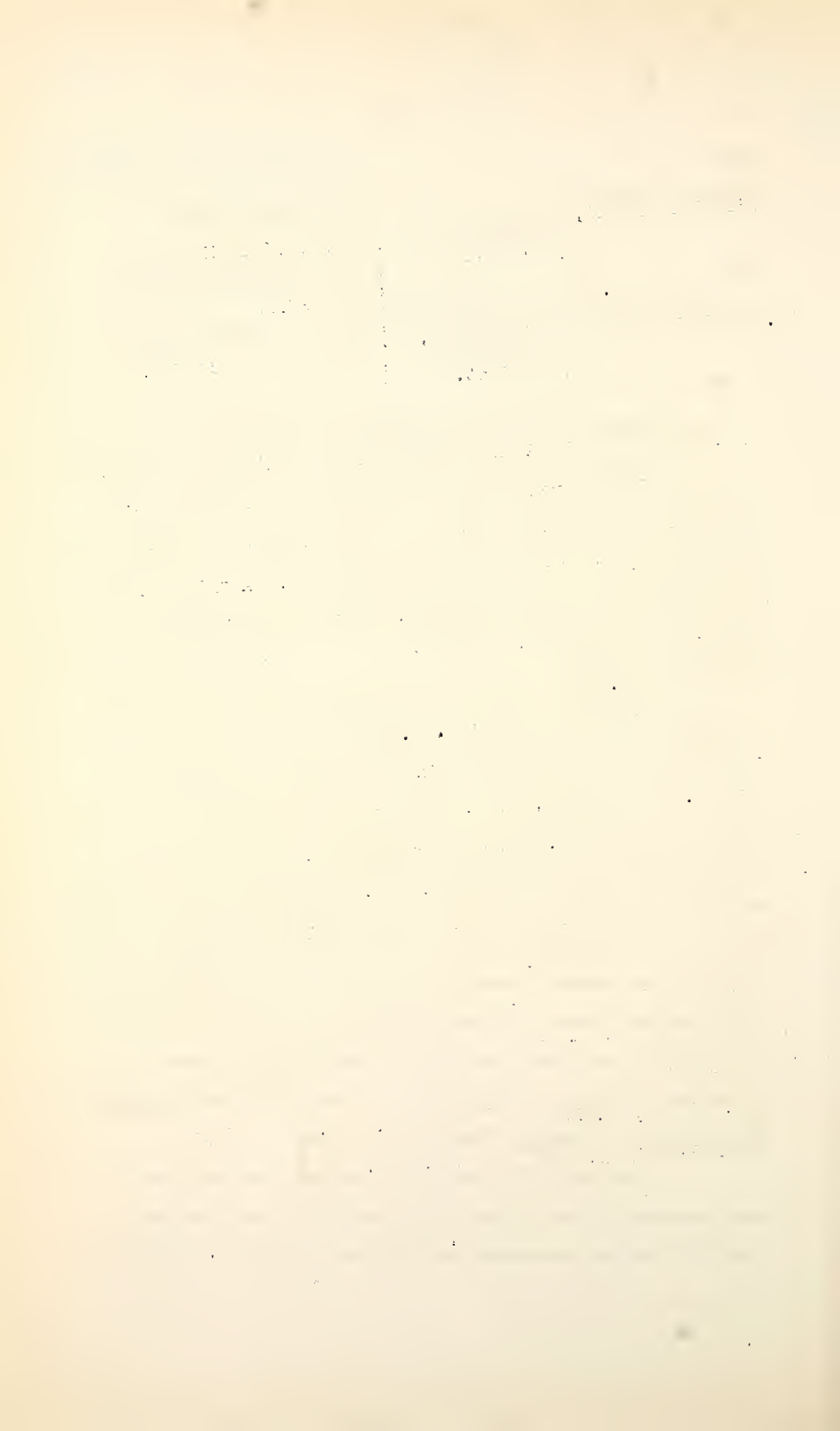
COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action for personal injuries alleged to have been caused by negligence of defendant in the operation of its business of a bath house. A trial with a jury resulted in a verdict for \$4,000 for plaintiff, and judgment was entered accordingly, from which judgment defendant appeals.

Defendant raises a jurisdictional question which must first be met before considering the merits of the controversy. On June 22, 1948, the action was dismissed for want of prosecution. On January 7, 1949, an order was entered vacating the order of dismissal. We find in the record a petition in the nature of coram nobis under section 72 of the Civil Practice Act, notice of the filing of such petition, an answer thereto, and a hearing resulted in the entry of said order. We are satisfied that the court had jurisdiction and was justified in vacating the order of dismissal. Ellman v. DeRuiter, 412 Ill. 285, 292; Admiral Corporation v. Newell, 348 Ill. App. 180.

The complaint charges defendant was the owner of and operated a bath house; that plaintiff, as a patron, paid his fee to defendant for the use of its facilities for



taking a bath. It charges general negligence in the failure to use proper care, skill and diligence in the operation and conduct of defendant's business, and as a result of defendant's negligence plaintiff was injured.

Defendant filed an answer, and in the same general terms denied the negligence charged, and alleged that whatever injuries plaintiff sustained, if any, were due to, or occasioned by the contributory negligence of plaintiff, which proximately caused the alleged injuries.

At the close of the plaintiff's case and again at the close of all the evidence, defendant moved for a directed verdict, which was denied. After verdict, defendant moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial, both of which motions were denied, and judgment was entered upon the verdict.

The evidence is undisputed that plaintiff was a patron of this bath house over a period of 20 years. On the day in question he went to defendant's place of business with his son, then 16 years of age, both of them becoming patrons and paying the fee charged for a bath. They went to the locker room and removed their clothing. The son descended a flight of stairs to the bath floor to obtain a pail, soap and towels for himself and plaintiff, preparatory for their bath. As he descended to the bath floor he noticed a pool of water around and over the drain in the floor. The water did not drain off. The water looked soapy. He was familiar with the physical surroundings, having been there before. The bath floor had a swimming pool in the center

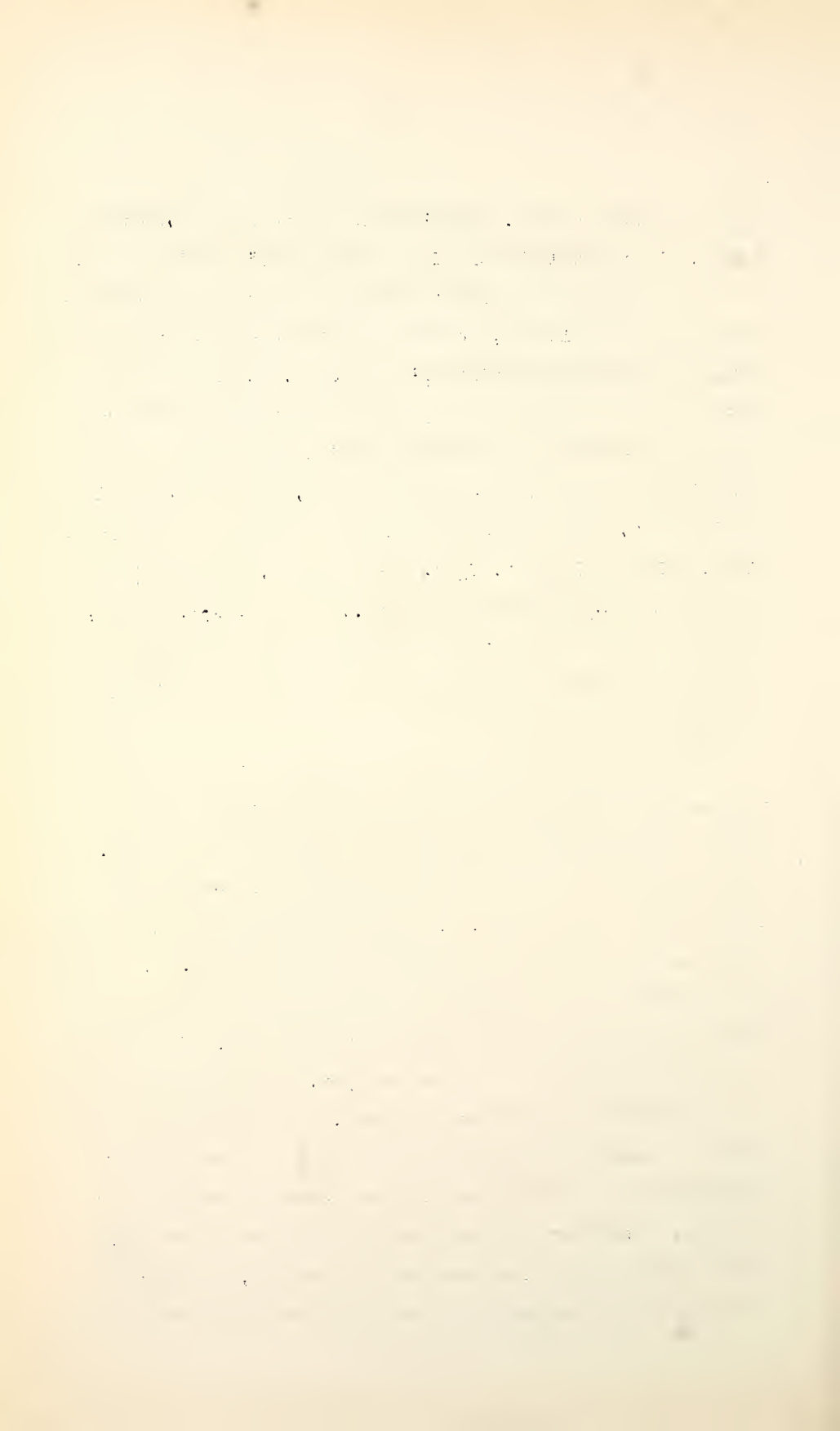
and benches along the east and west walls of the aisles between the swimming pool and the walls. He walked through the pool of water, apparently without any difficulty, and obtained the bucket, soap and towels. He went upstairs to the locker room to notify his father that he had everything ready. The two of them descended the staircase in question to the bath floor. The son preceded him. He heard a thud and observed his father had fallen to the floor.

Plaintiff testified through an interpreter as follows: "I just come out below the step there and then I find something down there and I fall. I no see with my own eyes. * * * When I got to the last step I found a big place and there was water and somebody in washing leaves a little soap there. The sewer was blocked up. I was just walking around, plop, plop, plop, plop, and I fell down this way. The soap was way below my feet and I didn't see the soap. * * * I fell on my right side." On cross-examination he testified: "When I got down there I saw soapy water and leaves. It was not all over the floor, it was only, you know, where the water goes down. I was walking and I walked right into the water and that is when I fell. There was a colored porter around there. * * * The water was halfway in the room and there were drains there. * * * I don't know how many drains * * * The place was in the same condition this day as it was every other day I have been there." On redirect examination he testified: "Before I fell I saw some kind of leaves there, but I didn't see the soap. I saw the foam, but the piece of soap, no. * * * All I saw was a little water. I saw lots of water before. Before when I went in there there was more water. I never paid no attention, I never do. That

day I happened to fall. That's all. I have seen water there before. When I walk before I saw the water." (*Italics ours.*)

This was all of the evidence in its most favorable light for the plaintiff, bearing upon the question of defendant's negligence and plaintiff's due care. We recognize that if there is any evidence, with all favorable inferences therefrom, tending to prove the material averments of the complaint, we cannot, as a matter of law, say that there is no liability, and it becomes a question of fact for the jury. Libby, McNeil & Libby v. Cook, 222 Ill. 206, followed in Minters v. Mid-City Management Corp., 331 Ill. App. 64, 71, and cases there cited. We are called upon to determine whether the verdict and judgment are against the manifest weight of the evidence.

The porter, employed by defendant at the time of the accident, testified he had been working there for four months previously and remembered the accident in question. His duties were to see that the floor was clean--soap and leaves kept off the floor. If there were any leaves he would pick them up. He would wash the floor with a hose. He would walk around to see that there wasn't any soap or lather or anything like that on the steps or on the floor. He made the rounds all day while the place was open. He had just finished his rounds when the accident happened. He was standing and looking, leaning up against the building. He had just got through cleaning the floor. He saw plaintiff holding on to his son. When they got downstairs to the bath floor plaintiff caught hold of the bannister of the pool, walked about half way to the swimming pool and then sat down, and the son



sat with him. There were three or four other people on the bench. Plaintiff sat about 15 minutes before he moved. He saw him get up from the bench; "he started to move * * * and he bent over * * * holding on to his right side, his right leg, like he didn't straighten all the way up, but he was just holding on to his right leg and finally walked about three feet and all of a sudden he went down." He walked over and picked him up, and when he picked him up he complained of pain. When he picked him up the floor was clean and moist. It wasn't wet. There was no soap or leaves and no plugged or flooded drains. There were ten drains on that floor. On cross-examination he further testified that he cleaned the floor regularly about every 15 minutes. When plaintiff got up from the bench and started to walk, he walked about 3 feet and then all at once he caught his leg, like he was going down on his right leg. He offered to give him a hand, and he told him to get away, that he could handle it himself. After he fell, "I offered to give him a hand * * * but he didn't want me to help him."

Another witness for defendant, who was in the bath house as a patron at the time of the accident, and apparently a disinterested witness, testified he frequented the bath house as a patron; that at the time of the accident he happened to come in to the bath house about the same time as plaintiff, and he noticed plaintiff with a young man walking with him; that plaintiff was sort of limping and that drew his attention; that he was taking a shower and happened to be facing plaintiff; that he noticed plaintiff was sitting

on one of the cement benches and the son was sitting along side of him; that plaintiff tried to get up, and he was in some kind of pain; that he was making a noise; that he tried a couple of times to get up; that he finally got up and started walking toward the place where there was water to pick up the bucket; that he tried to get water; that he saw plaintiff fall; that plaintiff had taken 3 to 6 steps before he fell; that "the condition of the bath room floor that day was O. K. It has always been clean over there. There were no drains plugged. I would say there were four to six drains. They were in plain sight from where I was standing, and they are scattered so the water always keeps going down. I didn't see any accumulation of water on the floor ankle deep. I didn't see any bunch of leaves--there may be a leaf here and there--there always will. You can't help it."

Another witness for defendant, a patron of the bath house at the time in question, testified that he was at the shower when he saw plaintiff come downstairs, and the fact that plaintiff was supporting himself with a cane and had been partially bent over attracted his attention; that he sort of staggered along with the help of a young man; that when he first saw plaintiff he was just coming down the last step; he didn't see him fall. When he went over to him the floor was semi-dry, because water was continually flowing, but it wasn't slippery; he didn't see any plugged drains; he saw no soap or leaves on the floor.

In the light of the testimony of these disinterested witnesses, and plaintiff's own admission that the accumulation of water he referred to was not over the entire area of the

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floor, that there was an area through which he could have walked without going through the water near the drain; the very fact that his son walked through the pool of water twice before the accident without difficulty, and the further fact that plaintiff does not claim he saw any soap on the floor and did not know what caused him to fall, convinces us that upon the question of plaintiff's due care and defendant's negligence, the verdict is against the manifest weight of the evidence, and it becomes our plain duty, under these circumstances, to reverse the judgment and remand the cause for a new trial. Norkevich v. Atchison, Topeka & Santa Fe Ry. Co., 263 Ill. App. 1, 4. (Certiorari denied by the Supreme Court.)

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

LEWE, P.J. AND KILEY, J., CONCUR.

210

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

$$\frac{dx}{dt} = P(x, y, z), \quad \frac{dy}{dt} = Q(x, y, z), \quad \frac{dz}{dt} = R(x, y, z),$$

where P, Q, R are functions of x, y, z which are continuous and have continuous first partial derivatives in a certain region V of the space (x, y, z) . It is assumed that the functions P, Q, R are bounded in V and that the Jacobian determinant

$$\Delta = \begin{vmatrix} P_x & P_y & P_z \\ Q_x & Q_y & Q_z \\ R_x & R_y & R_z \end{vmatrix}$$

is not equal to zero in V . Under these conditions it is proved that there exists a unique solution of the system of equations which satisfies the initial conditions

$$x(0) = x_0, \quad y(0) = y_0, \quad z(0) = z_0,$$

where x_0, y_0, z_0 are arbitrary constants. The proof is based on the method of successive approximations.

2. In the second part of the paper the problem of the stability of the solutions of the system of equations is considered. It is assumed that the functions P, Q, R are continuous and have continuous first partial derivatives in a certain region V of the space (x, y, z) . It is assumed that the functions P, Q, R are bounded in V and that the Jacobian determinant

$$\Delta = \begin{vmatrix} P_x & P_y & P_z \\ Q_x & Q_y & Q_z \\ R_x & R_y & R_z \end{vmatrix}$$

is not equal to zero in V . Under these conditions it is proved that the solutions of the system of equations are stable with respect to the initial conditions.

3. In the third part of the paper the problem of the periodicity of the solutions of the system of equations is considered. It is assumed that the functions P, Q, R are continuous and have continuous first partial derivatives in a certain region V of the space (x, y, z) . It is assumed that the functions P, Q, R are bounded in V and that the Jacobian determinant

$$\Delta = \begin{vmatrix} P_x & P_y & P_z \\ Q_x & Q_y & Q_z \\ R_x & R_y & R_z \end{vmatrix}$$

is not equal to zero in V . Under these conditions it is proved that the solutions of the system of equations are periodic with respect to the initial conditions.

Abstract

Gen. No. 10646

Agenda No. 24

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1952

349 I.A. 398

ROBERT G. HALL,

Plaintiff-Appellant,)

Appeal from

vs.)

Circuit Court

FRANK KOEHLER,

Defendant-Appellee.)

Du Page County.

ANDERSON -- J.

Robert G. Hall, plaintiff-appellant, filed his suit for personal injuries against Frank Koehler, defendant-appellee, in the Circuit Court of Du Page County, Illinois. The injuries were sustained as the result of an accident occurring about 9:00 A. M. on February 9, 1951 at or near the intersection of Catalpa Avenue and Irving Park Boulevard in the Village of Woodale, Illinois. The complaint alleged that the plaintiff was struck by an automobile negligently operated by the defendant and that the plaintiff sustained serious personal injuries. The defendant by answer denied these allegations. The case was tried on the issues and the jury returned a verdict of not guilty. A motion for a new trial was denied and judgment was entered on the verdict. The plaintiff has appealed.

The undisputed facts were as follows: Irving Park Boulevard is a two-lane concrete highway running generally east and west. Catalpa Avenue is a "T" street running north and south and terminating when it enters Irving Park Boulevard. The defendant prior to and at the time of the accident had been driving his automobile east on Irving Park Boulevard in the east bound traffic

EXHIBIT

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1952

349 I.A. 398

Appeal from	{	Plaintiff-appellant,	ROBERT G. HALL,
Circuit Court			vs.
In Page County.			FRANK KOEHLER,
		Defendant-appellee.	

ANDERSON -- J.

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The undisputed facts were as follows: Irving Park Boulevard is a two-lane concrete highway running generally east and west. Catalpa Avenue is a "T" street running north and south and terminating when it enters Irving Park Boulevard. The defendant prior to and at the time of the accident had been driving his automobile east on Irving Park Boulevard in the east bound traffic

lane. The day was clear and cold and there was ice and snow on the pavement, more on the east bound traffic lane than on the west lane. The plaintiff had been riding on a Motor Coach bus travelling west on Irving Park Boulevard. He had got off the bus where it had stopped to discharge passengers at the intersection of Irving Park Boulevard and Catalpa Avenue. He had stopped on the west side of Catalpa Avenue, started to cross Irving Park Boulevard and while on the paved portion of the highway, had been struck by the automobile operated by the defendant and as a result thereof had received serious personal injuries. There was no dispute as to the fact that the plaintiff had received these serious injuries including injuries to his head which had impaired his memory.

The plaintiff, Robert G. Hall, testified in substance: that he got off the bus; that he did not remember starting across Irving Park Boulevard or getting hit by the automobile; that the first conscious recollection he had was twenty-three days later when he discovered that he was in a hospital.

George S. Hall, father of the plaintiff, testified that just prior to the accident, he was standing on the front porch of the Community Club where he and his son resided; that he saw his son get off the bus at the intersection; that he saw his son look in both directions before he started to cross the highway; that while he was crossing the street, he was struck about the center of the street; that the Community House was "right straight across from Catalpa, probably fifty or sixty feet."

The defendant, Frank Koehler, testified: that he was driving his automobile about twenty or twenty-five miles per hour prior to the time he saw the plaintiff; that upon seeing the plaintiff crossing the street he immediately applied his brakes; that his car skidded on the icy pavement; that the plaintiff was beyond the middle of the west bound traffic lane, near the center of the street when he first saw him; that defendant did not blow his horn; that at the time his automobile struck the plaintiff, he was in the east bound traffic

lane. The day was clear and cold and there was ice and snow on the pavement. The plaintiff had been riding on a Motor Coach bus travelling west on Irving Park Boulevard. He had got off the bus where it had stopped to discharge passengers at the intersection of Irving Park Boulevard and Catalpa Avenue. He had stopped on the west side of Catalpa Avenue, started to cross Irving Park Boulevard and while on the paved portion of the highway, had been struck by the automobile operated by the defendant and as a result thereof had received serious personal injuries. There was no dispute as to the fact that the plaintiff had received these serious injuries including injuries to his head which had impaired his memory.

The plaintiff, Robert G. Hall, testified in substance: that he got off the bus; that he did not remember starting across Irving Park Boulevard or getting hit by the automobile; that the first conscious recollection he had was twenty-three days later when he discovered that he was in a hospital. George W. Hall, father of the plaintiff, testified that just prior to the accident, he was standing on the front porch of the Community Club where he and his son resided; that he saw his son get off the bus at the intersection; that he saw his son look in both directions before he started to cross the highway; that while he was crossing the street, he was struck about the center of the street; that the Community House was "right straight across from Catalpa, probably fifty or sixty feet."

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lane; that he did not see the plaintiff look to the west, that he was looking east all the time he was crossing; that his right front fender and headlights struck the plaintiff. He further testified as disclosed by the abstract: "He would say that the impact knocked the man maybe ~~thirty~~⁴⁴-five feet, although he doesn't know. ... He saw him get off the bus and then he saw the bus start west toward the witness. ... The next time he saw the pedestrian was when he was out near the center of Irving Park. At that time he was 60 to 80 feet west."

Rupert P. Wellendorf, a witness to the accident, testified: that he was driving at about twenty-five miles per hour behind the defendant for some time prior to the accident and that the distance between them did not change; that the defendant's car skidded between 150 and 200 feet; that he did not see the car hit the plaintiff.

George Adis, another witness to the accident, testified that he was driving west; that he saw the plaintiff alight from the bus and then attempt to cross Irving Park Boulevard from the north to the south; that he got past the west bound lane and was approximately in the center of the east bound lane when he was struck; that he did not see the plaintiff do anything before starting to cross the street; that he did not see him look in a westerly direction and believed that he looked straight ahead; that the defendant's car was travelling between twenty and twenty-five miles per hour; that the plaintiff crossed Irving Park Boulevard just a bit east of the east side of Catalpa Avenue; that he would say that the plaintiff was knocked about thirty feet by the impact; that he saw the car skid prior to the impact when defendant tried to avoid hitting the pedestrian.

The above is the material and pertinent testimony as disclosed by the abstract.

The plaintiff assigns as error for reversal of the judgment that the trial court erred in giving on behalf of the defendant certain instructions;

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The above is the material and pertinent testimony as disclosed by the abstract.

The plaintiff assigns as error for reversal of the judgment that the trial court erred in giving on behalf of the defendant certain instructions;

in giving three repetitious instructions instructing the jury to find the defendant not guilty; and for not awarding the plaintiff a new trial because the verdict was ^{manifestly} against the weight of the evidence. The defendant argues that he does not admit that the instructions given were erroneous, but even if they were, the plaintiff has not saved the right to assign error on these questions under the record in this case. An examination of the abstract and the record discloses that the instructions complained of were not set forth in the report of the trial proceedings. They were contained only in the common-law record. An examination of the common-law record shows that the instructions were filed with the clerk of the court. The instructions did not disclose who offered them and there was nothing showing whether they were "given" or "refused."

In *City of Chicago vs. Callender*, 396 Ill. 371, complaint was made that certain instructions were erroneously given and refused by the trial court. The court says on page 381:

"... The alleged errors with reference to the instructions cannot be considered. The instructions are not included in the report of proceedings where they should be. They are incorporated only in the common-law record. While the abstract is interspersed with appropriate statements showing that certain instructions were given and certain instructions refused, the record does not justify these statements. The instructions are not certified by the trial judge and made a part of the report of proceedings, and are not properly preserved in the record."

In the above case some of the instructions contained in the common-law record were marked "refused" and some were marked "given." The court further says on page 382:

"... there is nothing whatever in the record to show by whom any or either of these instructions were tendered. In this state of the record objections to the instructions obviously cannot be considered."

It has been repeatedly held that even where the instructions were incorporated in the report of trial proceedings, but the record did not disclose by whom the instructions were tendered, that the objections to the instructions would not be considered by the Appellate Court. (*Dorgan vs. Graef*, 335 Ill. App. 503.)

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the verdict was ^{manifestly} against the weight of the evidence. The defendant agrees

defendant not guilty; and for not awarding the plaintiff a new trial because

in giving three repetitious instructions in directing the jury to find the

For the above reasons the assignment of error as to instructions cannot be considered here.

The remaining assignment of error was that the verdict of the jury was manifestly against the weight of the evidence. Whether or not the defendant was negligent and whether or not the plaintiff was guilty of contributory negligence, are questions of fact peculiarly within the province of the jury to determine, and their findings cannot be lightly disturbed unless they are manifestly against the weight of the evidence. There is substantial evidence in this record showing that the defendant was not guilty of negligence in the manner in which he operated his automobile on the date in question. There is likewise substantial evidence in the record that the plaintiff was guilty of contributory negligence in the manner in which he crossed the street. The jury as reasonable persons might well have thought that the defendant's driving of his car at a speed of twenty to twenty-five miles per hour under the circumstances then existing did not constitute negligence, or they might have reasonably thought that the plaintiff did not look before he crossed the street and thus brought about his own injury by reason of his contributory negligence. Either absence of proof of defendant's negligence or of plaintiff's lack of due care would prevent recovery.

If it can be said that the verdict of the jury was based on substantial evidence and that such evidence, sustaining the verdict, was reasonable, fairly supported the verdict, and was not palpably wrong, then it follows that the verdict was not manifestly against the weight of the evidence and the reviewing court has no power to substitute its judgment for that of the jury. This is an elementary principle of law which in varying language has been announced many times by courts of review. (Blumb vs. Getz, 366 Ill. 273; Bouslough vs. Schumacher, 279 Ill. App. 79.)

We believe from an analysis of the evidence and applicable rules of law that the jury were fully warranted in returning a verdict in favor of the

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contributory negligence in the manner in which he crossed the street. The jury as reasonable persons might well have thought that the defendant's driving of his car at a speed of twenty-five miles per hour under the circumstances then existing did not constitute negligence, or they might have reasonably thought that the plaintiff did not look where he crossed the street and thus brought about his own injury by reason of his contributory negligence. Either absence of proof of defendant's negligence or of plaintiff's lack of due care would prevent recovery.

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We relieve from an analysis of the evidence and applicable rules of law that the jury were fully warranted in returning a verdict in favor of the

defendant and that the verdict and judgment entered thereon cannot be said to be manifestly against the weight of the evidence. The trial court was correct in overruling plaintiff's motion for a new trial and entering judgment on the verdict. We find plaintiff's assignments of error are without merit and the judgment of the trial court should be and is affirmed.

Judgment affirmed,

defendant and that the verdict and judgment entered thereon cannot be said to be manifestly against the weight of the evidence. The trial court was correct in overruling plaintiff's motion for a new trial and entering judgment on the verdict. To find plaintiff's allegations of error are without merit and the judgment of the trial court should be and is affirmed.

Judgment affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October
~~February~~ Term, A. D. 195²₈

General No. 9855

Agenda No. 5

JACKSONVILLE BUS LINE COMPANY,
Plaintiff-Appellant,

vs.

HERBERT WATSON,
Defendant-Appellee.

349 I.A. 462¹

)
) Appeal from
) Circuit Court of
) Greene County
)
)

O'Connor, J.

The complaint which was originally filed in the Circuit Court of Greene County in this action set forth in substance that the defendant was operating as a common carrier without any authority and in violation of the provisions of the Public Utilities Act and prayed that he be restrained from conducting said illegal and unauthorized operations on U. S. Highway 67 between Roodhouse and East Alton, Illinois. After a hearing, the Chancellor entered a decree denying the writ of injunction. Plaintiff appealed to this court.

We determined that the defendant indiscriminately accepted and discharged all persons who offered themselves for transportation and that such conduct of the defendant was an attempt to evade the provisions of Section 57 of the Public Utilities Act, and we therefore reversed and remanded the cause to the Circuit Court of Greene County with directions to enter a decree perpetually enjoining the defendant as prayed for in the complaint. Jacksonville Bus Line Co. v. Watson, 344 Ill. App. 175.

100301

STATE OF ILLINOIS
APPELLATE COURT
JAMES H. HARRIS

October
1928

Appellate No. 2

Appellate No. 255

3491.1.102

James Harris
Appellate No. 2
Appellate Court of
Illinois

JACKSONVILLE AND THE COMMERCE
BANK OF ILLINOIS

James Harris
Appellate No. 2
Appellate Court of
Illinois

Appellate No. 2

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without any authority and in violation of the provisions of
the Public Utilities Act and prayed that he be restrained from
conducting said illegal and unauthorized operations as a
common carrier between Rockhouse and East Alton, Illinois, after
a hearing, the Chancellor entered a decree granting the writ of

injunction. Plaintiff appealed to this court.
We determined that the defendant intentionally ac-
quired and maintained all persons and effects transported for
transportation and that such conduct of the defendant was an
attempt to evade the provisions of Section 27 of the Public
Utilities Act, and we therefore reversed and remanded the order
to the Circuit Court of Greene County with directions to enter
a decree permanently enjoining the defendant as prayed for in
the complaint. JACKSONVILLE AND THE COMMERCE BANK OF ILLINOIS, 349 Ill.

App. 175.

Following the entry of this opinion the mandate was issued directing the Circuit Court of Greene County to enter a decree perpetually enjoining the defendant as prayed for in the complaint.

Pursuant to this mandate the Circuit Court of Greene County entered the following decree perpetually enjoining and restraining the defendant from conducting motor bus operations:

" * * * It Is Therefore Ordered, Adjudged and Decreed by the Court:

"1. That the defendant, Herbert Watson, his agents, servants and assigns, be restrained and enjoined perpetually from further conducting motor bus operations as set forth in plaintiff's complaint between Roodhouse, Illinois, and East Alton, Illinois, over, upon and along U. S. Highway 67, and that the People's Writ of Injunction issue immediately commanding said Herbert Watson, his agents, servants and assigns to cease motor bus operations over, upon and along U. S. Highway 67 between Roodhouse, Illinois, and East Alton, Illinois, as set forth in plaintiff's complaint."

A Writ of Injunction was issued in accordance with the decree and was served on the defendant December 8, 1951, and on the same day the defendant ceased operation of the busses.

Thereafter the defendant entered into a contract with the employees of the Owens-Illinois Glass Company in which defendant undertook to supply them with transportation from Roodhouse and nearby points to the plant in Alton.

Section 3 of the contract read as follows:

"3. That no person or persons other than said EMPLOYEES, who are parties to this AGREEMENT, are to be carried or transported in said motor busses or any of them so long as said busses or any of them are being used by said WATSON in the performance of

Following the entry of this motion the same was issued

directing the Circuit Court of Greene County to issue a writ of habeas corpus and return the same to the court at the time and place specified in the return.

The court in this regard the Circuit Court of Greene County

issued the following order: "The court do hereby order that the

return be made to the court at the time and place specified in the return.

Order:

"1. That the defendant, Herbert Wilson, his wife, and

and family, be returned and enjoined from further

conducting their business in the State of Illinois.

That between the defendant, Herbert Wilson, and his wife, and

over, upon and from the 1st day of May, 1931, and until the

date of judgment there be no further and no more

conduct, and that the defendant, Herbert Wilson, and his wife, and

over, upon and from the 1st day of May, 1931, and until the

date of judgment there be no further and no more

conduct, and that the defendant, Herbert Wilson, and his wife, and

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date of judgment there be no further and no more

conduct, and that the defendant, Herbert Wilson, and his wife, and

over, upon and from the 1st day of May, 1931, and until the

his said obligations and undertakings under this AGREEMENT, PROVIDED, HOWEVER, that said WATSON may, at his option and election, by written agreements, identical in terms with this AGREEMENT, transport employees of the following named industrial plants, to-wit:

Western Cartridge Company, a corporation,

East Alton, Illinois;

Laclede Steel Company, a corporation,

Federal, Illinois; and

Alton Box Board Company, a corporation,

Federal, Illinois;

who sign and are parties to such written agreements, identical in terms with this AGREEMENT.

"It specifically is understood and agreed by and between said parties hereto that said WATSON shall not indiscriminately accept or discharge such persons as may offer themselves for transportation but shall transport only employees of said industrial plants with whom he has said written agreements, as aforesaid."

Similar contracts were entered into by the defendant with the employees of the Western Cartridge Company, the Laclede Steel Company and Alton Box Board Company.

On December 13, 1951, the defendant again began operation of his busses pursuant to these contracts.

Plaintiff filed a petition in the Circuit Court of Greene County praying that the defendant show cause why he should not be held in contempt of court for failure to obey the injunction decree entered on December 7, 1951.

his said obligation and undertaking under this agreement,
PROVIDED, HOWEVER, that said Watson pay, at his option and
election, by written agreement, before 1 is taken with this
agreement, transport services of the following named individuals
Albany, to-wit:

Western C. Freight Company, a corporation,
East Alton, Illinois;

Madison Steel Company, a corporation,
East Alton, Illinois; and

Alton Box Board Company, a corporation,
East Alton, Illinois;

who said and who parties to whom written agreements, in writing
in form with this agreement.

"It is specifically understood and agreed by and between
said parties hereto that said Watson shall not unilaterally
accept or issue any such orders as may either be required for
transportation of said goods or any other goods of said indus-
trial plants with whom he has said written agreements, as afore-
said."

Similar agreements were entered into by the defendant with
the employees of the Western C. Freight Company, the Madison Steel
Company and Alton Box Board Company.

On December 13, 1931, the defendant and said labor organization
of his business agreement to these conditions.

Plaintiff filed a motion in the Circuit Court of St. Louis
County praying that the defendant show cause why he should not
be held in contempt of court for failure to obey the injunction
decreed entered on December 7, 1931.

Defendant filed an answer in which he denied that he was violating the injunction order and alleged that the contracts referred to above were identical with the written contract approved as a contract for private carriage by this court in the case of Illinois Highway Transportation Company v. Hantel, et al., 323 Ill. App. 364.

The Circuit Court of Greene County entered a decree finding that the defendant was not in contempt of court and dismissing the petition. This appeal followed.

The question for decision is whether or not the execution of the contracts in question changes the operation from what we have previously found to be an illegal operation into a legal operation.

It is plaintiff's position that the defendant's actions constitute a mere change in the form of the ticket or contract which he previously had and that this mere change in form cannot change the operations from operations which we found to be illegal operations into legal operations.

It is further their position that the defendant is attempting to relitigate the issues previously decided herein, and that the defendant cannot do this, and that since he is performing the same services that he was performing previously that he cannot avail himself of the defense that he is a private contract carrier. Plaintiff insists that the previous decision of this court, the mandate and the decree, prevent the defendant from operating on U. S. Highway 67 either as a private or a contract carrier.

Plaintiff misconstrues our previous decision herein. Our previous decision was based upon the evidence that the defendant was in fact indiscriminately accepting and discharging all persons

in the case of Illinois v. Wainwright, 419 U.S. 1 (1974), at 11, 323 Ill. 2d 100, 101.

The Circuit Court of Cook County entered a decree finding that the defendant was not in contact of contact with the defendant. This court followed.

The question for decision is whether or not the execution of the non profit in question amounts to the execution of a legal operation. This court follows.

It is the plaintiff's position that the defendant's actions constitute a legal operation in the sense of the law of the state which is previously stated and that the defendant is not in contact with the defendant from operations which are found to be illegal operations into legal operations.

It is further stated that the defendant is not in contact with the defendant from operations which are found to be illegal operations into legal operations.

to replicate the issues previously stated herein, and that the defendant cannot do this, and that the defendant is not in contact with the defendant from operations which are found to be illegal operations into legal operations.

available to the defendant from operations which are found to be illegal operations into legal operations.

plaintiff insists that the previous decision of this court, the defendant and the defendant, prevent the defendant from operating on U.S. Highway 67 either as a private or a public entity.

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previous decision of this court, the defendant and the defendant, prevent the defendant from operating on U.S. Highway 67 either as a private or a public entity.

in the case of Illinois v. Wainwright, 419 U.S. 1 (1974), at 11, 323 Ill. 2d 100, 101.

who offered themselves for transportation, and was operating as a public carrier without attempting to comply with the Public Utilities Act. We believe that the evidence of the defendant's subsequent conduct shows that he has changed his operations from those of public carrier to those of a private contract carrier.

We held in *Illinois Highway Transportation Company v. Hantel*, supra, that the operation of a bus under a contract, similar to those in question here, was not operating as a common carrier and that the owners of such a bus did not have to comply with the provisions of the Public Utilities Act. We stated that a common carrier is one who undertakes for the public to transport such persons as choose to hire him and that the Public Utilities Act applies to the carriage of persons for hire and to one indiscriminately accepting and discharging such persons as may offer themselves for transportation. We held that Hantel was not operating as a public carrier subject to the Public Utilities Act. The contracts in this case were modelled after the contract in the Hantel case, and defendant's operation under them were those of a person engaged in private contract hauling and not those of a public utility.

In our previous decision in this case we did not hold that the defendant could not operate on U. S. Highway 67. We held that he could not operate illegally on this highway as a public carrier, in violation of the provisions of the Public Utilities Act. The mandate and the decree both specifically prohibit the defendant from operating as set forth in plaintiff's original complaint. In plaintiff's original complaint they sought relief against defendant's "illegal and unauthorized operation." We could not have denied and we did not deny the defendant the right to use the public highway as a private contract carrier.

Plaintiff complains that it will suffer financial loss by reason of defendant's operations. We have no power to guarantee the plaintiff against financial loss from competition with private contract carriers. Plaintiff is entitled to be freed from the competition of a public carrier unless the Illinois Commerce Commission sees fit to allow the operation of another carrier in this same territory, but plaintiff is not entitled to be free from whatever competition it may suffer from a private carrier.

It is our opinion that defendant is operating as a private carrier and is not now operating as a public carrier.

In our previous opinion we found that the defendant indiscriminately accepted and discharged all persons who offered themselves for transportation. Under the contracts in question he specifically agrees in paragraph 3 that he "shall not indiscriminately accept or discharge such persons as may offer themselves for transportation, but shall transport only employees of said industrial plants with whom he has said written agreements, as aforesaid."

This constitutes more than a change in the form of contract. This is a substantial change in the method of operation. It is a change from the operation of a public carrier to the operation of a private contract carrier.

Defendant did not violate the injunction.

Order affirmed.

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a private contract.

It is not certain that it will be the same.

It is not certain that it will be the same.

It is not certain that it will be the same.

45893

135 A

JOHN GULAN,)
Appellee,)
v.) APPEAL FROM MUNICIPAL COURT
ROBERT GABRIEL,) OF CHICAGO.
Appellant.)

349 T.A. 462

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

About 1:15 A.M., on February 24, 1948, plaintiff parked his car at the northerly curb of Belmont avenue, east of the intersection of Central Park avenue, in Chicago. Defendant driving his truck in a westerly direction on Belmont avenue crashed into the rear of plaintiff's standing automobile, inflicting property damages, for which the jury gave plaintiff a verdict of \$371.64. On this verdict the court entered judgment, and defendant appeals.

The court instructed the jury that the question of contributory negligence did not apply in this case because plaintiff was not in the parked car. This was error, but we can understand how the court was led into it. Harassed residents of some sections of the city where parking space is unavailable have come to regard the privilege as a civil right. However, any experience with the highways will reveal that a parked car can be a great danger to traffic. Clearly, the instruction was erroneous. The question is whether or not it was reversible error.

Plaintiff testified that he parked the car at a proper and lawful parking space next to the curb. Defend-

ent's testimony is that he was traveling west on the right hand side of the road near the curb and that plaintiff's car was parked along the curb three feet east of a crosswalk, a place in which parking is not permitted. Defendant then says, "When I went to swing out, it was either in a rut, or the steering apparatus, something. I just couldn't make the turn out." The only construction that can be put upon this language is that defendant saw the parked car in ample time, but something happened which he did not fully understand, and he could not make the turn out. Defendant contends that the absence of any evidence as to a tail light would require the case to go to the jury. However, his own testimony reveals that neither the parking of plaintiff's car at the place where it stood, nor the absence of a tail light contributed proximately to the collision. It was either a rut in the street or the failure of defendant's steering apparatus to work, or, as the jury might have inferred from other evidence, his own inability to co-ordinate that caused the accident.

Defendant charges error with respect to the evidence of the cost of repairs to plaintiff's car. A bill by a garage generally engaged in the business of repairing automobiles was presented. Plaintiff testified that all of the repairs were necessitated by the accident, and that the bill had been paid. This makes a prima facie case. Defendant says the bill was not the original, but a copy. It is unimportant whether the bill is an original or a

copy. The point is that it was made by one engaged in the business of making such repairs; that the repairs made were of damages caused solely by the accident, and that plaintiff paid the bill. Byalos v. Matheson, 243 Ill. App. 60; Singer v. Gross et al., 257 Ill. App. 41; Finch v. Carlton, 249 Ill. App. 15.

Judgment affirmed.

Robson, P. J., concurs.

Tuohy, J., took no part.

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45858

WILLIAM HENRY, doing business as Wilane Trading Co.,)	
Appellee,)	APPEAL FROM MUNICIPAL
)	
v.	)	COURT OF CHICAGO.
)	
BEN MALTZ, MARSHALL MALTZ and ROSE MALTZ, doing business as Chicago Watch House,)	
Appellants.	)	349 I.A. 463 ¹

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, William Henry, doing business as Wilane Trading Company, sued Ben Maltz and Rose Maltz, husband and wife, and Marshall Maltz, their son, doing business as Chicago Watch House, for a balance claimed to be due on the sale and repairs of watches sold by plaintiff to defendants. From a judgment for plaintiff in the sum of \$2,104.11 after trial by the court without a jury, defendants appeal.

During the period from December 6, 1947 to March 25, 1948 defendants purchased from plaintiff Swiss watches in the aggregate amount of \$30,867. On June 14, 1948 plaintiff's attorney wrote a letter to defendants demanding payment of \$9705.21 balance. Defendants disputed the amount of this claim, advising plaintiff that they were entitled to certain unallowed credits. Thereafter negotiations were had, as a result of which it was agreed that the matter would be settled and disposed of by defendants returning to plaintiff 606 new and unused watches which had been sold by plaintiff to defendants, a

check in the sum of \$1,000 dated July 17, 1948, a check dated September 15, 1948 for \$1,000, and a note dated July 15, 1948 payable 30 days thereafter, in the amount of \$3,520.06. It was further agreed that when the note and checks had been fully paid defendants would be released from all obligations. The compromise was effected by plaintiff waiving the charge of \$270 for repairs, allowing credit in the sum of \$458.25 for 141 watches (which defendants claimed to have returned but which plaintiff denied receiving), and a credit of \$1,956.90 for the return of the 606 new and unused watches.

However, instead of returning 606 new watches to plaintiff, defendants returned watches, none of which were new, many of which were worthless, and a considerable number of which had never belonged to plaintiff, which action plaintiff maintains had the legal effect of terminating the settlement and reinstating the original claim.

Defendants dispute this legal conclusion, relying upon the principle that where an accord and satisfaction is fully executed there can be no rescission on the ground of fraud without restoring or offering to restore what has been accepted in satisfaction (Reed v. Engel, 237 Ill. 628), and upon the further proposition that when goods are received in settlement of an account plaintiff may not accept so much of the offer as is favorable and reject the remainder. (Canton Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244.)

These principles of law are well established, but the facts here are not such as to make them applicable. Here the evidence established that the accord and satisfaction was not fully executed by defendants. One of the considerations supporting the agreement, in fact the most important one, was that defendants would return 606 new watches, which they failed to do. Where the consideration upon which an accord and satisfaction is based fails, it necessarily terminates the agreement and there is no necessity for restitution of the consideration received in partial satisfaction so long as credit pro tanto has been allowed. In such case the rule applies as expressed in In re Estate of Cunningham, 311 Ill. 311, where the court said (p. 316):

"If we concede that this offer by Bond and this acceptance by the claimants is an accord, it is clear that Bond, by stopping payment of the checks, prevented the execution of the accord. In order to constitute a bar to an action on the original claim the accord must be fully executed. * * * There was no accord and satisfaction * * *."

In Stitzel v. Franks, 126 Ill. App. 260, the court said:

"They agreed upon a settlement, but the settlement was not carried out. The terms of the settlement are in dispute, but both sides agree that the settlement was not carried into effect, so that there was no accord and satisfaction, even on defendant's own theory and testimony."

In Farmers & Mech. Life Ass'n v. Caine, 224 Ill. 599, the court said at page 606:

"An acceptance by the creditor from the debtor of a less sum than the amount due in full satisfaction of the debt is a discharge only of so much of the debt as is equal in amount to the sum received. * * * The payment of a less sum is not a satisfaction of a larger sum, even when so received, without a release by deed. * * * Nor is it

essential to the right of action that the creditor should rescind the contract of settlement and return the money he has received under it before bringing suit. All that is required is that the debtor should have credit for the sum paid."

But defendants further contend that plaintiff retained the watches for an unreasonable length of time during which period he cashed defendants' postdated checks and received payment on the 30-day note, such action thereby constituting an acceptance of the watches returned and thereby completely executing the settlement agreement. The question of the length of time that the watches were held without complaint is in dispute. The testimony of plaintiff's agent is that within two weeks after the purportedly new watches had been sent to New York by defendants he, the agent, pursuant to instructions from New York, went to defendant Ben Maltz and told him the watches were not new and that New York had complained about them; that at this conversation Maltz said he was not interested in the condition of the watches but that he held the agent's receipt for new and unused watches and was standing upon his receipt. Plaintiff's agent testified that he had another conversation with Ben Maltz about August 15th in which he told Maltz he had not received all the returns from New York but as soon as he did he would see that the used watches were returned to Maltz; that Maltz said he was not interested in the return of the watches and that if they were returned he would refuse them; that he considered the deal closed. The trial court found this testimony worthy of belief.

The trial court was justified under the evidence in making this finding of fact, and it follows that, plaintiff's tender having been refused, plaintiff was entitled to salvage what he could out of the watches in his possession and apply that amount to defendants' account, which procedure the evidence shows was followed. Defendants urge that the plaintiff's cashing of defendants' post-dated checks and his acceptance of payment of the note were inconsistent with his claim of rejection, citing authority to the effect that when goods are received in settlement of an account, the plaintiff may not accept so much of the offer as is favorable to him and reject the remainder without consent of the defendant. Canton Coal Co. v. The Parlin & Orendroff Co., 215 Ill. 244. The latter case is authority merely for the proposition that where a check is offered in full satisfaction of a disputed account the creditor, in the absence of a waiver of the condition, has no alternative except to reject or accept the check, and if he accepts it the acceptance includes the condition of satisfaction although he protests to the contrary. This principle does not meet the instant facts. In addition to failure of consideration, the facts here indicate no dispute as to the major portion of the account. The balance due at the time of the settlement agreement was \$9,705.20. The portion of this balance in dispute, aside from the credit to be allowed for the return of the watches, amounted to only \$728.25, so that the checks cashed and the note which was satisfied were but part payment upon

a balance admittedly due. Defendants by failing to return new watches deprived themselves of the \$1956.90 credit to which, had they performed the contract in accordance with their agreement, they would have been entitled. Under these circumstances there was no requirement that plaintiff should return amounts admittedly owed before suing for a disputed balance. In Reed v. Engel, 237 Ill. 628, it was held that the cashing of a check sent by a real estate dealer to another person as the latter's share of the profits from sales of land cannot be held to be an accord and satisfaction if such other person, before consenting to accept the check, was deceived by the dealer's misstatement of facts. The court in that case held that the appellee was not required to return the check before beginning suit, that it was sufficient that the amount of the check was credited to appellant's account.

The trial court properly found the issues in favor of plaintiff. The judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.

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4

V.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

349 L.A. 463²

Plaintiffs brought an action of forcible entry and detainer against defendants to recover possession of demised commercial premises comprising the second floor of a building at 4047-4051 Fullerton avenue in Chicago. Defendants had for many years occupied the premises and operated thereon a bowling alley and billiard parlor, as tenants of the Chicago Realty Management Corporation, as agent of beneficiaries of the American National Bank and Trust Company of Chicago, under written leases entered into from time to time. On July 1, 1950 a new lease had been executed for a period of five years, expiring by its terms on June 30, 1955, subject however, to an option-termination clause, the pertinent part of which reads as follows: "Further, it is understood and agreed by and between the parties hereto that Lessor or its assigns have the privilege and right of terminating this Lease on giving 120 days written notice to the Lessees of said intent to terminate and cancel this lease at any time after July 1st, 1952." Plaintiffs acquired the property by purchase, after the lease of July 1, 1950 had been entered into, and desired to exercise the option and thereby gain possession of the demised premises. Accordingly, on February 29, 1952,

they served written notice of their election to terminate the lease as of July 2, 1952. Upon trial without a jury, the court granted defendants' motion for a directed finding at the close of plaintiffs' case and entered judgment for defendants, from which plaintiffs have taken an appeal.

Defendants take the position that the optional termination clause is clear and unambiguous and gave plaintiffs the right to terminate the lease by serving a notice only after July 1, 1952, allowing 120 days thereafter to the defendants before the lease could be terminated. Plaintiffs, on the other hand, contend that the intention of the parties, as expressed in the clause, should be interpreted to mean that the lessor or its assigns have the privilege and right of terminating the lease at any time after July 1, 1952, on giving a prior 120-day written notice to the lessees of an intent to cancel. No doubt the option termination is inaptly drawn and is, as the trial judge observed, subject to two interpretations. Under the circumstances, extraneous evidence of the object and intent of the parties was properly admitted. It is an established principle of law that where the construction of a lease or other contract is ambiguous, or open to conflicting interpretations, evidence may be adduced to ascertain the object and intent of the parties and to give effect thereto. Chicago Auditorium Ass'n v. Fine Arts Building, 244 Ill. 532; Gale v. U. S. Brewing Co., 181 Ill. App. 381; Adams v. Gordon, 265 Ill. 87. The pertinent rules of construction are succinctly stated in 51 C.J.S.

Landlord and Tenant § 231 (pr. 848 et seq.): in subsection b--"The object in construing a lease is to ascertain and give effect, if possible, to the mutual intention of the parties, without regard to the refinements of technical distinctions, in so far as such construction may be made without the contravention of legal principles. . . ."; in subsection d--"A lease will be given a reasonable construction where that is possible, rather than an unreasonable one. The court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other. A construction leading to an absurd, harsh, and unreasonable result should be avoided, if possible. . . ."; and in subsection g: " . . . In giving effect to the intention of the parties as indicated by the instrument, particular words may sometimes be supplied, substituted, or transposed. . . ."

As further authority in support of the propriety of transposing particular words, see Ayers v. Heustess, 127 S.W. 957, 94 Ark. 493, and Union Water Power Co. v. Lewiston, 49 A. 878, 95 Me. 171.

Several witnesses testified as to the object and intent of the parties in drawing the optional termination clause. Rudolph J. Kraft, one of the defendant lessees and manager of the bowling alley, under his section 33 examination, stated that the bowling season begins about the first part of September and closes toward the middle of May; that during the three months of June, July and August the demised premises

are closed to business; and that the bowling-season league contracts are negotiated by defendant lessees in April, five months before the opening of the bowling season. L. I. Ryan, manager of the Chicago Realty Management Corporation, the original lessor and agent of the building, testified that he had signed the lease on behalf of the corporation; that a month or two prior to July 1, 1950 he had discussed with Kraft the terms of the lease and the rider thereto; that the corporation had previously made at least five leases for the premises with defendants, and that on each occasion an optional termination clause for the lessor was discussed, inasmuch as the property was held in trust and was always subject to sale; that in discussing the lease here under consideration he "informed Mr. Kraft there would have to be a cancellation of the lease . . . in the event it [the property] was sold," and he stated to Mr. Kraft that the new lease could be canceled on July 1, 1952. Ted Manczko, one of the plaintiffs and an assignee of the original lessor, testified that when he informed Kraft of the change in the building ownership, he told him, in reply to his question, that he was going into the bowling-alley business, and that Kraft had commented "well, when my time comes up in 1952, in July--."

The option clause designates July 1, 1952, which is precisely the expiration date of the second annual period of the lease of July 1, 1950, for the exercise of the option by the lessor or its assigns. It would thus appear that if

the specified date of July 1, 1952 be related to the commencing date for "giving 120 days written notice to the Lessees of said intent to terminate and cancel this lease," the option clause designates no date whatsoever on which the lease and tenancy would be terminated upon a 120-day notice, although such notice could obviously be given for longer than 120 days. It is therefore apparent that the object and intent of the clause was to fix the specified date of July 1, 1952 as the commencing date for the termination of the lease, at the option of the lessor or its assigns, and not for the commencing date of the issuance of the 120-day notice; otherwise the absolute term of the lease to lessees would not extend for two full years, as was clearly intended, but for a period of no less than two years plus the four months requisite for the 120-day notice of the "intent to terminate and cancel this lease." Thus, to give the clause the construction for which defendants successfully contended in the trial court--that the 120-day notice was premature and inopportune until July 1, 1952--would do violence to the manifest intent of the parties that lessees be granted an absolute irrevocable two-year lease, and that the option clause vest the lessor or its assigns with the privilege "to terminate and cancel" the lease at any time after July 1, 1952, upon the giving of a 120-day prior written notice to defendants of such intent.

Moreover, as plaintiffs' counsel point out, it would be unreasonable to infer that the parties intended to fix

the date for the commencement of the operation of the option during the midst of an annual period of the lease, i.e., two years and four months from the lease date, or during the course of the bowling season. Rather, ^{it} seems reasonable to presume that the parties intended by the clause to render the lease subject to termination commencing with July 2, 1952, as Ryan, who signed the lease on behalf of the lessor, specifically testified. As heretofore stated, bowling-league contracts with defendants were made in April for the ensuing bowling season which runs from September to April of each year. In view of this common practice, the option termination clause could not have been calculated to permit the lessees to make contracts with league teams in April, only to find themselves notified in July or subsequently, after the contracts had been made, or at the height of the bowling season, of the intent of the lessor or its assigns to cancel and terminate the lease at some time after the beginning of the bowling season; instead, it is logical to presume that the parties intended to protect the lessees with an absolute right to a two-year term of the lease, and grant the lessor or its assigns the privilege, thereafter, to terminate the lease, at option, subject only to a 120-day prior written notice of the intent so to do. In consonance with these circumstances, plaintiffs served the 120-day notice on February 29, 1952, with the intention of terminating the lease as of July 2, 1952, a time when the bowling alley was closed; and by receiving the notice in February, lessees were on notice

a few months before the bowling league contracts were to be made, that they would no longer have the use of the premises when the new season began in September 1952.

For the reasons indicated we are of opinion that the court erred in directing a finding at the close of plaintiffs' case and entering judgment for defendants. Accordingly, the judgment of the Municipal Court is reversed and the cause remanded with directions to enter judgment for possession in favor of plaintiffs.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, J., and BURKE, J., Concur.

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45941

TED MANCZKO et al.,)	
Appellants,)	APPEAL FROM
v.)	MUNICIPAL COURT
AGNES MOBERG et al.,)	OF CHICAGO
Appellees.)	
)	

ON PETITION FOR REHEARING.

In their petition for rehearing which is herewith denied, defendants point out that the remandment order precludes them from their right to interpose a defense by the introduction of evidence touching upon the intention of the parties with respect to the optional termination clause.

Accordingly, the remandment order is modified to read: Judgment of the Municipal Court is reversed and the cause remanded with directions that further proceedings be had not inconsistent with the views expressed herein.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER and BURKE, JJ., Concur.

\$428.50 paying \$140.00 down, leaving a balance of \$288.50 Sales, Inc., the automobile in question for a time price of that January 24, 1951, defendant purchased from Edwards Motor licensed and authorized to do business in the State of Illinois; The complaint alleged that plaintiff is a corporation against the defendant-appellant, Barbara J. Thompson, for possession of an automobile and for judgment in the sum of \$91.47. favor of the plaintiff, Universal C.I.T. Credit Corporation, and This is an action in replevin wherein the Court found in

Wheat, P. 1.

Counterdefendants-Appellees.)
 Universal C.I.T. Credit Corporation,)
 a Corporation, and Edwards Motor Sales,)
 Inc.,)
 vs.)

Barbara J. Thompson,)
 Defendant-Appellant.)
 vs.)
 Barbara J. Thompson,)
 Plaintiff-Appellee,)
 Universal C.I.T. Credit Corporation,)
 a Corporation,)

General No. 9836

FEBRUARY TERM, A.D. 1953

THIRD DISTRICT

STATE OF ILLINOIS

Abstract

Amended No. 3

345 I.A. 464

Appeal from the)
 Circuit Court of)
 Sangamon County)

which defendant agreed to pay in fifteen successive monthly installments of \$185.90 each, the first installment to be due on February 24, 1951; that thereafter the defendant received and accepted the automobile; that on January 24, 1951, Edwards Motor Sales, Inc., sold and assigned all right and interest in said automobile to plaintiff; that plaintiff has received from defendant five monthly payments of \$185.90 each, or \$929.50, leaving unpaid time balance of \$1,859.00 with July 24th, 1951, and August 24th, 1951, installments due, unpaid, and in default; that on August 25, 1951, the plaintiff requested and demanded return of said automobile which defendant refused to deliver; that defendant wrongfully detained said automobile; that defendant agreed in writing to pay a reasonable sum, 15% if allowed, as attorney's fees if defendant defaulted and contract was placed with an attorney and that the agreement was placed with an attorney because of defendant's default; that plaintiff was damaged by the wrongful acts of the defendant in the sum of \$2137.85, being the unpaid balance of \$1,859.00, plus attorney's fees of \$278.85, wherefore plaintiff prayed for judgment for such amount. Thereafter on December 4, 1951, following a series of pleadings, the Court allowed plaintiff's Motion for Judgment on the pleadings for possession of the automobile and for judgment in the sum of \$991.47 and costs. A Writ of Retorno Habendo was issued on December 7, 1951. The sheriff made return on said Writ to the effect that he had served a copy thereof on the defendant on December 15, 1951; that he had demanded a return of said property but defendant had refused to deliver the same; that on December 16, 1951, the sheriff took possession of the said property. Afterward, on December 17, 1951, plaintiff filed a petition for a rule to show cause against

which defendant claims to be in full possession of, in-
stalments of \$185.00 each, the first installment to be due on
February 24, 1951; that thereafter the defendant received and
accepted the automobile; that on January 24, 1951, defendant received
from the said
Ford Motor Company, Inc., a bill for the interest in said
automobile to plaintiff; that plaintiff has received from defendant
five monthly payments of \$185.00 each, to \$925.00, leaving
an unpaid balance of \$185.00 which was paid, in full, on August
24, 1951, installments due, unpaid, and in default; that on
March 22, 1951, the plaintiff repudiated and demanded return of
said automobile which defendant refused to deliver; that defendant
wrongfully retained said automobile; that defendant agreed in writing
to pay a reasonable sum, \$25.00, as attorney's fees if
defendant defaulted and costs were fixed with an attorney and
the agreement was placed with an attorney because of defendant's
default; that plaintiff was entitled to the unpaid balance
of the defendant in the sum of \$185.00, plus the unpaid balance
of \$185.00, plus attorney's fees of \$25.00, whereas plaintiff
sought for judgment for such amount. Thereafter on December 4,
1951, following a series of pleadings, the court allowed plaintiff's
motion for judgment on the pleadings for possession of
the automobile and for judgment in the sum of \$395.00 and costs.
The writ of return habendo was issued on December 7, 1951. The
defendant made return on said writ to the effect that he had served
copy thereof on the defendant on December 12, 1951; that he had
received a return of said property but defendant had refused to
deliver the same; that on December 13, 1951, the sheriff took
possession of said property. Afterward, on December 17,
1951, plaintiff filed a petition for a rule to show cause against

defendant for failure to turn over said automobile to plaintiff and a contempt order was entered on December 18, 1951, against defendant and her attorney, J. W. Templeman. This appeal follows.

Defendant relies on the following as reversible errors of the trial court in this cause; contending that -

1. The Court erred in entering a judgment on the pleadings while an answer was on file.
2. The Court erred in ordering the Writ of Retorno Habendo to issue herein.
3. The Court erred in assessing damages against the defendant without proof or evidence to sustain it.
4. The Court erred in assessing damages when the defendant has requested a jury.
5. The Court erred proceeding to enforce said judgment after a notice of appeal had been filed and before the time had passed in which the same could be made a supersedeas by the filing of a bond.
6. The Court erred in ordering the property involved here to be removed from the possession of the defendant before the judgment herein was final.
7. The Court erred in entering the said judgment herein.

The defendant first contends that the judgment entered on the pleadings was erroneous when an answer was on file containing a general denial. The facts reveal that on October 29, 1951, a hearing was had on plaintiff's motion to strike the answer and motion of the defendant; that said motion to strike was allowed by the Court and parts of said pleading were ordered stricken and defendant given leave to amend by November 19, 1951; that on November 16, 1951, amended pleading was filed by the de-

defendant for failure to turn over said auto bills to plaintiff and a contempt order was entered on December 18, 1951, against defendant and her attorney, J. W. Templeman. This appeal follows.

Defendant relies on the following as reversible errors of

the trial court in this cause; contending that -

1. The Court erred in entering a judgment on the plead-

ings while an answer was on file.

2. The Court erred in ordering the writ of habeas corpus

to issue herein.

3. The Court erred in assessing damages against the defend-

ant without proof or evidence to sustain it.

4. The Court erred in assessing damages when the defendant

has requested a jury.

5. The Court erred proceeding to enforce said judgment

after a notice of appeal had been filed and before the time had passed in which the same could be made a supersedeas by the filing of a bond.

6. The Court erred in ordering the property involved here

to be removed from the possession of the defendant before the

judgment herein was final.

7. The Court erred in entering the said judgment herein.

The defendant first contended that the judgment entered on the pleadings was erroneous when an answer was on file containing a general denial. The facts reveal that on October 2,

1951, a motion was made on plaintiff's motion to strike the

answer and motion of the defendant; that said motion to strike

was allowed by the Court and parts of said pleading were ordered

stricken and defendant given leave to amend by November 19, 1951;

that on November 16, 1951, amended pleading was filed by the de-

defendant. Plaintiff contends that where a second answer, filed after a preceding one is held materially insufficient, is subject to the same objections, defendant is in default unless he requests and is given leave to plead further. This is true as to the parts of the pleading ordered stricken, if the amendment as to these parts does not conform to the Court's order, but it does not follow that other parts of the original pleadings, not ordered stricken by the Court, do not stand as to denials made, which must be met by proof.

Reviewing the pleading it is noted that defendant in its answer and motion and amended answer and motion denied that plaintiff is a corporation licensed and authorized to do business in Illinois; denied that plaintiff received, by dealer assignment, all right, title and interest in and to the contract entered into between defendant and Edwards Motor Sales, Inc., and denied plaintiff has interest in said automobile; denied that plaintiff requested and demanded return of the automobile; denied that plaintiff is entitled to the sum of 15% for attorney's fees under the pertinent contract and denied damage to plaintiff. The above denials were not ordered stricken or amended by the Court and stand in the absence of proof to the contrary. It was improper for the Court to grant a judgment on the pleadings where general denials must be met with proof. Defendant had requested a jury and in the absence of a waiver of such demand had a right to have the jury pass on the facts with regard to the general denials that are material to plaintiff's right to prevail.

~~Defendant~~
Plaintiff cites Central States Coop. v. Watson Bros., 404 Ill., 566, in support of her position. In this case the complaint alleged that the defendant wrongfully held over after expiration of a lease and was liable to the plaintiff for reasonable

Defendant. Plaintiff contends that where a second answer, filed after a preceding one is held materially insufficient, is subject to the same objections, defendant is in default unless he requests and is given leave to plead further. This is true as to the parts of the pleading ordered stricken, if the amendment as to these parts does not conform to the Court's order, but it does not follow that other parts of the original pleadings, not ordered stricken by the Court, do not stand as to denials made, which must be met by proof.

Reviewing the pleading it is noted that defendant in its answer and motion and amended answer and motion denied that plaintiff is a corporation licensed and authorized to do business in Illinois; denied that plaintiff received, by dealer assignment, all right, title and interest in and to the contract entered into between defendant and Edwards Motor Sales, Inc., and denied that plaintiff has interest in said automobile; denied that plaintiff requested and demanded return of the automobile; denied that plaintiff is entitled to the sum of \$15,000 for attorney's fees under the pertinent contract and denied damage to plaintiff. The above denials were not ordered stricken or amended by the Court and stand in the absence of proof to the contrary. It was improper for the Court to grant a judgment on the pleadings where general denials must be met with proof. Defendant had requested a jury and in the absence of a waiver of such demand had a right to have the jury pass on the facts with regard to the general denials that the material to plaintiff's right to prevail.

Defendant
Plaintiff cites Central States Coop. v. Watson Bros.

Ill. 111, 566, in support of her position. In this case the complaint alleged that the defendant wrongfully held over after expiration of a lease and was liable to the plaintiff for reasonable

rent for the use and occupancy of plaintiff's premises thereafter. The defendant, in his answer, denied the allegations of the complaint and alleged as an affirmative defense that the defendant held possession of the premises under a verbal agreement of the parties for a stipulated rental to a certain date and thereafter for the reasonable rental value of the premises. The Court held that the plaintiff was not entitled to a judgment on the pleadings as the defendant's denials were sufficient to require plaintiff to submit proof. In the opinion the Court stated, "From these allegations of the complaint and answer it clearly appears to this Court that the defendant's answer contained an explicit denial of the allegations of the complaint. Assuming for the purposes of this opinion that the answer had contained merely the general denials above referred to and had not contained any affirmative defense allegations, the appellee definitely would not have been entitled to a judgment on the pleadings because it appears that the ^{appellants'} ~~defendant's~~ denials were sufficiently explicit to require plaintiff to submit proof". The Court also stated, "As we stated in Leitch v. Sanitary District, 386 Ill.433, 'Citation of authorities is not necessary in support of the well-established rule that a party to suit, either at law or equity, cannot have relief under proofs without allegations, nor under allegations without proof in support'."

In Bauerle v. Long, 165 Ill.340, cited by plaintiff, the Court stated, "It becomes ^{important} ~~necessary~~ for us to determine the question whether, where part of the answer only is excepted to and held insufficient, the bill can be taken as confessed as to the whole bill or only to that part to which the answer is held insufficient. The object and purpose of the statute being to expedite business and prevent encumbering the records with unnecessary proof and to save

rent for the use and occupancy of plaintiff's premises thereafter. The defendant, in his answer, denied the allegations of the complaint and alleged as an affirmative defense that the defendant held possession of the premises under a verbal agreement of the parties for a stipulated rental to a certain date and thereafter for the reasonable rental value of the premises. The Court held that the plaintiff was not entitled to a judgment on the pleadings as the defendant's denials were sufficient to require plaintiff to submit proof. In the opinion the Court stated, "From these allegations of the complaint and answer it clearly appears to this Court that the defendant's answer contained an explicit denial of the allegations of the complaint. Assuming for the purposes of this opinion that the answer had contained merely the general denials above referred to and had not contained any affirmative defenses allegations, the appellee definitely would not have been entitled to a judgment on the pleadings because it appears that the defendant's denials were sufficiently explicit to require plaintiff to submit proof." The Court also stated, "As we stated in Leitch v. Sanitary District, 380 Ill. 433, citation of authorities is not necessary in support of the well-established rule that a party to suit, either at law or equity, cannot have relief under process without allegations, nor under allegations without proof in support."

In Baerle v. Long, 105 Ill. 340, cited by plaintiff, the Court stated, "It becomes necessary for us to determine the question whether, where part of the answer only is excepted to and held insufficient, the bill can be taken as confessed as to the whole bill or only to that part to which the answer is held insufficient. The object and purpose of the statute being to expedite business and prevent encumbering the records with unnecessary proof and to save

expense, where a defendant fails to comply with the statute and answer fully, and where he refuses to comply with the order of Court and answer an allegation of the bill, he is by the statute declared to be in the position of one who is in default. He is without an answer. In the words of the statute above quoted, the bill shall be taken as confessed by him where he fails to file further answer where his answer has been adjudged insufficient. No part of his answer stands in such case. The bill is taken as confessed, - not a part thereof, but the bill itself". This was an 1897 case and the Court referred to Secs. 23 and 24 of the Chancery Act which sections have since been repealed by the Civil Practice Act. Plaintiff also referred to Yates v. Continental Ins. Co., 207 Ill.512, and Meeren v. Smith, 276 Ill.App.438. In the Yates opinion, dated 1904, the Court stated, "We have held that, where exceptions to an answer are allowed, and the remainder of the answer presents no material issue, and the defendant makes no further answer, it is proper to decree that the petition or bill of the complaint be taken as confessed for want of an answer". The question then, under this statement, in our present situation is whether the remainder of the answer presents any material issue. In Meeren v. Smith, supra, the plaintiff in error assigned as error the fact that there was no rule taken requiring them to make further answer. The Court stated, "We are of the opinion that the rule does not apply in this case for two reasons. First, plaintiffs in error elected to abide by their answer. Second, the rule does not apply to those cases where the portions of the answer which remain after the Court has sustained exceptions, neither deny nor avoid material allegations of the bill". In the instant case then, considering the portions of the answer which remained after the Court had

expenses, where a defendant fails to comply with the statute and
answer fails, and where he refuses to comply with the order of
Court and answer an affidavit of due diligence is by the statute
declared to be in the position of one who is in default. He is
without an answer. In the words of the statute above quoted, the
bill shall be taken as confessed by him when he fails to file
his answer where his answer has been attached thereto.
No part of the answer stands in such case. The bill is taken as
confessed, "not a part thereof, but the bill itself." This was
an 1897 case and the Court referred to cases 13 and 14 of the
Chancery Act which sections have since been repealed by the Civil
Practice Act. Plaintiff also referred to Yates v. Continental Ins.
Co., 207 Ill. 515, and Yates v. Yates, 215 Ill. App. 435. In the
latter decision, dated 1904, the Court stated, "we have held that
where exceptions to an answer are allowed, and the remainder of
the answer presents no material issue, and the defendant takes no
further answer, it is proper to decree that the petition or bill
of the complaint be taken as confessed for want of an answer."
The question then, under this statement, is one of material question
is whether the remainder of the answer presents any material issue.
In Yates v. Yates, supra, the plaintiff in error assigned as error
the fact that there was no ruling on the resolution made to make further
answer. The Court stated, "we are of the opinion that the rule does
not apply in this case for two reasons. First, plaintiffs in error
elected to abide by their answer. Second, the rule does not apply
to those cases where the portions of the answer which remain after
the Court has sustained exceptions, neither deny nor avoid material
allegations of the bill." In the instant case then, considering
the portions of the answer which remained after the Court had

stricken certain parts of defendant's answer and given defendant leave to amend, (which defendant by subsequent pleading did not effectively do) did the portions of the answer which remained deny or avoid material allegations?

In our opinion the defendant had the right to be heard ~~with regard to her denials that plaintiff was a corporation licensed and authorized to do business in Illinois; that plaintiff received,~~ *As to whether or not the* by assignment, any interest in the contract between defendant and Edwards Motor Sales; that plaintiff requested and demanded return of automobile; that plaintiff is entitled to 15% attorney fee under the contract which defendant signed; and that plaintiff has sustained any damage. The complaint, Paragraph 9, alleges that "On the 25th day of August, 1951, the plaintiff requested and demanded return of said property, but the defendant refused to deliver up possession thereof to plaintiff". Defendant in Paragraph 9 of her answer and her amended answer, "Denies allegations of Paragraph 9 of complaint". Plaintiff's Motion to Strike did not refer to Paragraph 9 of defendant's answer. Hence, defendant's denial that plaintiff requested and demanded return of property was a denial of a material allegation and plaintiff is placed in the position of having to furnish proof to support the allegation in Paragraph 9 of the Complaint. If defendant gets possession of property lawfully, replevin does not lie until after demand and refusal. Ohio & M.Ry.Co. v. Noe, 77 Ill.513; Clark v. Lewis, 35 Ill.417; Toledo, St. L. & K. C. Ry. Co. v. American Refrigerator Transit Co., ^{Ill.} 41 App.625.

It is our conclusion that defendant's denials, other than those matters ordered stricken by the Court with leave to amend, were sufficient to require plaintiff to submit proof and that defendant had the right, having demanded a jury, to have the facts

stricken certain parts of defendant's answer and given defendant leave to amend, (which defendant by subsequent pleading did not effectively do) did the portions of the answer which remained any or avoid material allegations?

In our opinion the defendant had the right to be heard ~~regard to her denial that plaintiff was a certain person~~ *Edith K. Lewis et al* and defendant to be heard in Illinois; that plaintiff received by assignment, any interest in the contract between defendant and Edith K. Lewis; that plaintiff requested and demanded return of automobile; that plaintiff is entitled to 1% attorney fee under the contract which defendant signed; and that plaintiff has sustained any damage. The complaint, Paragraph 2, alleges that on the 25th day of August, 1931, the plaintiff requested and demanded return of said property, but the defendant refused to deliver up possession thereof to plaintiff. Defendant in Paragraph 3 of her answer and her amended answer, "Denies allegations of Paragraph 2 of complaint." Plaintiff's motion to strike did not refer to Paragraph 2 of defendant's answer. Hence, defendant's denial that plaintiff requested and demanded return of property was a denial of a material allegation and plaintiff is placed in the position of having to furnish proof to support the allegation in Paragraph 2 of the complaint. If defendant gets possession of property lawfully, plaintiff does not lie until after demand and refusal. Ohio v. K. Co. v. K. Co., 77 Ill. 213; Clark v. Lewis, 35 Ill. 417; Toledo, St. L. & K. Co. v. American Refrigerator Transit Co., 11 App. 625.

It is our conclusion that defendant's denial, other than those matters ordered stricken by the Court with leave to amend, were sufficient to require plaintiff to submit proof and that defendant had the right, having demanded a jury, to have the facts

pertaining to the denials heard and passed upon by a jury.

Defendant contends that the Court erred in assessing damages when the defendant had requested a jury; and that the Court also erred in assessing damages against the defendant without proof or evidence to sustain it. Plaintiff's answer is that if the defendant is dissatisfied with assessment of damages, her remedy is to apply to the Court to correct or set aside the assessment. Plaintiff further contends that a jury demand made in connection with the original appearance does not suffice to require assessment of damages by a jury after default in pleadings or striking pleadings and the jury request must be renewed or directed particularly to the assessment of damages in case of or after default. Cases are cited by both parties. Plaintiff refers to Says v. ^aYoungs, 187 Ill.App.23, which is published in abstract form. Therein the statement is made, "Where a default is taken against defendants for want of a sufficient affidavit of merits, they are not entitled to a jury to assess the damages where no specific demand for a jury was made after the default, notwithstanding, they demanded a jury on entering their appearance". In our present case, in accordance with our views above stated, there has been no default. The complaint alleges damages denied in defendant's answer which denial is not ordered stricken by the Court's order dated October 22, 1951. Hence the question of damages is for the jury, a jury having been requested. The complaint claimed damages in the amount of the total unpaid time balance plus attorney's fees. The Court in assessing damages used the monthly contract payment of \$185.90 and multiplied that figure by 5 1/3 and held that sum, to-wit \$991.47, as the fair damages sustained by the plaintiff. The measure of damages for detention in a replevin suit , where the

...relating to the contents heard and passed upon by a jury.
Defendant contends that the Court erred in assessing damages
when the defendant had requested a jury; and that the Court also
erred in assessing damages against the defendant without proof or
evidence to sustain it. Plaintiff's answer is that if the defen-
dant is dissatisfied with assessment of damages, her remedy is to
apply to the Court to correct or set aside the assessment. Plaintiff
further contends that a jury award made in connection with the
original appearance was not sufficient to require assessment of dam-
ages by a jury after trial in pleadings or examining pleadings
and that any request made for renewal or directed particularly to
the assessment of damages in case of or after default. Cases are
cited by both parties. Plaintiff refers to Lyons v. Lyons,
107 Ill.App.2d, which is published in reverse form. Therein the
statement is made, "where a default is taken against defendants
for want of a sufficient affidavit of merits, they are not entitled
to a jury to assess the damages where no specific demand for a jury
was made after the default, notwithstanding they demanded a jury
on entering their appearance". In our present case, in accordance
with our view above stated, there has been no default. The com-
plaint alleges damages averred therein in defendant's answer which denial is
not ordered set aside by the Court's order dated October 25, 1951.
Hence the question of damages is for the jury, a jury having been
requested. The complaint claimed damages in the amount of the
total unpaid bill, balance plus attorney's fees. The Court in
assessing damages used the monthly contract payment of \$185.90 and
multiplied that figure by 2 1/2 and held that sum, to-wit \$91.47,
to be the fair damages sustained by the plaintiff. The measure of
damages for detention in a replevin suit . . . where the

plaintiff recovers, and where the property involved has a usable value, is the reasonable net rental value thereof. (Cottrell v. Gerson, 296 Ill.App.412). We believe the defendant had the right to present evidence to the jury on the reasonable net rental value of the automobile and have the jury pass on the question of damages.

Marrone v. Ehrat, 175 Ill.App.649, cited by defendant is a case similar to the one at hand as regards assessment of damages. In this case the plaintiffs filed their statement and affidavit of claim, alleging that there was due the plaintiffs from the defendant the sum of \$825.42 and interest thereon. The defendant entered his appearance and entered a demand for a trial by jury and also asked leave to file a set-off in said cause. Defendant filed an affidavit of merits and also a set-off supported by affidavit. On motion of plaintiffs the affidavit of merits was ordered stricken and leave given to defendant to file an amended affidavit of merits, which he did, together with an amended set-off. Later, on motion of plaintiffs, the Court ordered that said amended affidavit of merits and set-off be stricken from the files, and; "it appearing to the Court that * * * the defendant herein is in default for want of an affidavit of merits or defense in this cause, it is, on motion of the plaintiffs, ordered by the Court that judgment be entered herein against said defendant by default for want of such affidavit of merits". Later, the Court found there was due plaintiffs the sum of money shown in said affidavit of claim to be due, \$852.59, and without any witnesses being sworn, and without any testimony being offered by the plaintiffs, entered the judgment. On appeal, the Appellate Court stated, "It appears from the record that at the time of entering his appearance defendant filed a demand in writing for a trial by jury. The default of defendant for failure to

plaintiff's recovery, and where the property involved was a vehicle
value, is the reasonable net rental value thereof. (Goff v.
Person, 170 Ill. App. 412). He believes the defendant had the right
to present evidence to the jury on the reasonable net rental value
of the automobile and have the jury pass on the question of damages.
Karpov v. Karpov, 173 Ill. App. 644, cited by defendant as
being similar to the one at hand as regards assessment of damages.
In this case the plaintiff filed a statement and affidavit of
damages, alleging that there was due the plaintiff from the defendant
the sum of \$10,000 and interest thereon. The defendant entered his
appearance and entered a demand for a trial by jury and also moved
leave to file a set-off in said cause. Defendant filed an affidavit
of merits and also a set-off supported by affidavit. On motion of
plaintiff the affidavit of merits was ordered stricken and leave
given to defendant to file an amended affidavit of merits, which
he did, together with an amended set-off. Later, on motion of
plaintiff, the court ordered that said amended affidavit of merits
and set-off be stricken from the file, and it appearing to the
court that the defendant herein is in default for want of an
affidavit of merits or answer in this cause, he is, on motion of
the plaintiff, ordered by the court that judgment be entered here-
in against said defendant by default for want of such affidavit of
merits. Later, the court found there was due the plaintiff the sum
of money shown in said affidavit of claim to be due, \$10,000, and
without any witness being sworn, and without any testimony being
offered by the plaintiff, entered the judgment. On appeal, the
Appellate Court stated, "It appears from the record that at the
time of entering his appearance defendant filed a demand in writ-
ing for a trial by jury. The default of defendant for failure to

file a sufficient affidavit of merits did not admit the amount of plaintiff's damages. In our opinion, the Municipal Court has no power, by rule or otherwise, to prevent a defendant from having plaintiff's damages assessed by a jury, if a jury trial is demanded in writing by the defendant * * * *".

We believe that the trial Court erred in failing to grant to defendant a trial by jury.

For the above reasons, the order of the Circuit Court is reversed and cause is remanded.

Reversed and remanded.

Mr. Justice Carroll took no part in the consideration or decision of this case.

the sufficient evidence of motive is not that the amount of
plaintiff's damages. In our opinion, the Federal Court has no
power, by rule or otherwise, to prevent a defendant from having
plaintiff's damages assessed by a jury, if a jury trial is de-
manded in writing by the defendant * * *

We believe that the trial Court erred in failing to grant
to defendant a trial by jury.
For the above reasons, the order of the Circuit Court is
reversed and case is remanded.

Reversed and remanded.

Mr. Justice Carroll took no part in the consideration or
decision of this case.

3308.

THIRD DISTRICT

General No. 9859

Agenda No. 6

349 I.A. 465⁷

Appeal from the
Circuit Court of
Adams County

vs.

Nicholas Reddick,

Defendant-Appellee.

Wheat, P. J.

This is an action for wrongful death brought by Howard Richmiller, Administrator of the Estate of Mallie Pearl Richmiller, deceased, plaintiff-appellant, against Nicholas Reddick, defendant-appellee. At the close of plaintiff's case the Court granted defendant's motion for a directed verdict. Upon denial of the motion for a new trial, this appeal follows.

The amended complaint charged that Hallie Pearl Richmiller had been a guest passenger in the automobile of the defendant; that she had been free of any wilful and wanton misconduct on her part proximately contributing to the injuries causing her death and that such injuries were proximately caused by the wilful and wanton misconduct of the defendant in the operation of his car. Such elements of the case must necessarily both be alleged and proved (Prater v. Buell, 336 Ill.App.533). As to directing a verdict, the rule is that a motion to direct a verdict should be allowed if, when all

Exhibit

STATE OF ILLINOIS

THIRD DISTRICT

APPELLATE COURT

RECORDS, 1923

Volume No. 3

Page No. 323

349 A. 403

Appeal from the
Circuit Court of
James County

Edward Nicholas, Administrator of the
Estate of Nellie Pearl Nicholas,
deceased,

Plaintiff-appellant,

Defendant-appellee.

vs.
John Lee Hedrick,

Page, p. 4.

This is an action for wrongful death brought by Edward Nicholas, Administrator of the Estate of Nellie Pearl Nicholas, deceased, Plaintiff-appellant, against Nicholas Hedrick, defendant-appellee. At the close of plaintiff's case the Court granted defendant's motion for a directed verdict. Upon denial of the motion for a new trial, this appeal follows.

The amended complaint charged that Nellie Pearl Nicholas had been a guest passenger in the automobile of the defendant; that she had been free of any willful and wanton misconduct on her part proximately contributing to the injuries causing her death and that such injuries were proximately caused by the willful and wanton misconduct of the defendant in the operation of his car. Such elements of the case must necessarily both be alleged and proved (Prater v. Nell, 330 Ill.App.233). As to directing a verdict, the rule is that a motion to direct a verdict should be allowed if, when all

the evidence is considered with all reasonable inferences to be drawn therefrom in its aspects most favorable to the party against whom the motion is directed, there is a complete failure to prove one or more necessary elements of the case. (Carrell v. N. Y. Central R. R. Co., 384 Ill.599). As to whether Hallie Pearl Richmiller was free from any wilful and wanton misconduct, all of the facts and circumstances in evidence and all reasonable inferences to be drawn therefrom must necessarily be considered.

The evidence indicates that she was the wife of Howard Richmiller and the mother of seven children and was pregnant at the time of her death. She was married in 1939 at the age of sixteen; during her lifetime she prepared the meals for the family, did the laundry, kept house generally and gave assistance to the children with their school lessons. The Richmillers and the Reddicks were neighbors on friendly terms and frequently "traded" automobile rides to Quincy; that on the day in question a Reddick daughter was baby sitting at the Richmiller home. According to the statements made by the defendant, on the day in question Mrs. Richmiller had asked for a ride to town. When she entered the car she sat on the right hand side of the front seat, Mrs. Reddick sat in the middle and the defendant was driving. After stating in detail as to the happenings just prior and at the time of the accident, he stated that after the car struck the culvert he and his wife were out of the car and that Mrs. Richmiller was wedged under the steering wheel. It is important to note that inferences as to what plaintiff's intestate did or did not do just prior to the accident may be inferred equally not only from what an eye witness says but what he does not say. Here in statements made at two different times to two different persons purporting to state the facts and circumstances

the evidence is considered with all reasonable inferences to be drawn therefrom in its aspects most favorable to the party against whom the motion is directed, there is a complete failure to prove one or more necessary elements of the case. (Carroll v. W. J. Carroll, 104 Ill. 599). As to whether Nellie Pearl Michallier was free from any willful and wanton misconduct, all of the facts and circumstances in evidence and all reasonable inferences to be drawn therefrom must necessarily be considered.

The evidence indicates that she was the wife of Howard Michallier and the mother of seven children and was pregnant at the time of her death. She was married in 1919 at the age of sixty-four; during her lifetime she prepared the meals for the family, did the laundry, kept house generally and gave assistance to the children with their school lessons. The Michalliers and the Redicks were not persons on friendly terms and frequently "fought" and were often quarrelsome; that on the day in question a Redick automobile was driven by the defendant on the lot in question. Michallier had asked for a ride in the car. When she entered the car she sat on the right hand side of the front seat, Mr. Redick sat in the middle and the defendant was driving. After starting in to drive to the hospital, just prior and at the time of the accident, he asked that after the car struck the cyclist he and his wife were out of the car and that Mrs. Michallier was wedged under the steering wheel. It is important to note that inferences as to what position the witness did or did not do just prior to the accident may be inferred equally not only from what an eye witness says but what he does not say. Here in statements made at two different times to two different persons purporting to state the facts and circumstances

surrounding the happening of the accident, defendant nowhere indicates that plaintiff's intestate did anything other than merely ride in the car. From his testimony it seems obvious that the skidding of the car and the collision with the culvert all happened in a matter of seconds and it does not appear that there was anything which plaintiff's intestate could do or fail to do which might constitute contributory wilful and wanton misconduct. In view of the general testimony as to her home situation, inferences as to her health and the statements of defendant as to the occurrence, there was sufficient testimony for this case to go to the jury on this issue and the trial court was in error in granting the motion for a directed verdict.

As to the conduct of defendant, the evidence is basically that on November 22, 1950, at about 3:15 P.M., defendant was driving toward Quincy, Illinois, on the Burton road. His direction of travel does not appear from the complaint or the evidence but presumably he was going west. He was driving down-hill on a black-top road, the paved portion of which was twelve to fifteen feet wide; it had snowed slightly in the morning but it melted rapidly; in the afternoon the day was clear, the pavement was wet in spots, the shoulders muddy. The rear end of the car skidded onto the left shoulder and the car skidded sideways into a concrete culvert abutment. Defendant was injured, and his wife and plaintiff's intestate were killed.

Police Officer Mutz testified that he went to the scene of the accident shortly after it happened; the car was against the southwest abutment, there were fresh skid marks on the shoulder from the abutment to a point thirty to forty feet east of the same; the paved portion of the road was fifteen feet wide; the shoulders were muddy; the sun was shining. He talked to the defendant who

...the defendant, defendant's name is ...
...cases that plaintiff's interest in ...
...ride in the car. From his ...
...kidding of the car and the collision with the driver, all ...
...in a matter of seconds and it does not appear that ...
...thing which plaintiff's interest could be ...
...against the defendant's ...
...view of the general testimony as to her ...
...as to her health and the ...
...remedy, there was sufficient testimony for this case to ...
...jury on this issue and the trial court was in error in ...
...the action for a direct verdict.

...as to the conduct of defendant, the evidence is ...
...that on November 24, 1930, at about 3:15 p.m., defendant was driv-
...ing toward Quincy, Illinois, on the Norton road. The direction of
...travel does not appear from the ...
...usually he was going west. He was driving down ...
...top road, the paved portion of which was twelve to fifteen feet
...wide; it had snowed slightly in the morning but it melted rapidly;
...in the afternoon the day was clear, the pavement was wet in spots,
...the shoulders muddy. The front end of the car ...
...left shoulder and the car skidded sideways into a concrete ...
...abutment. Defendant was injured, and his wife and ...
...persons were killed.

Police Officer ... testified that he went to the scene of
the accident shortly after it happened; the car was against the
southwest abutment, there were fresh skid marks on the shoulder
from the abutment to a point thirty to forty feet east of the same;
the paved portion of the road was fifteen feet wide; the shoulders
were muddy; the sun was shining. He talked to the defendant who

said he had had some drinks at home; that just before the accident he came over the hill and lost control of his car, swerving to the left side of the road; the car skidded sideways down the road into the culvert; that he was late for work and that was why he was going so fast.

The witness Howard Richmiller, husband of Hallie Pearl Richmiller, testified that at the intersection of 48th Street and Burton road, there is a hill going down grade from east to west about two hundred feet long; the black-top on the day in question was smooth but the shoulders were rough. It had snowed briefly in the morning but it quickly melted; in the afternoon the weather was clear and the pavement fairly dry, although there was some mud, cow tracks, on it. The witness said that in January, 1951, he had a conversation with defendant who stated that he came up the hill at about forty to forty-five miles per hour and when he got to the top he saw the road was clear, he pushed down on the gas, the back end of the car slid around and the car went down the hill and hit the culvert; that the car first went off onto the north shoulder and then the back end spun around and the car slid sideways down the road until it hit the culvert; that he had had a few beers in a tavern that day; that the shoulders of the road were muddy. The witness also stated that defendant had lost his left arm a year or more before this accident.

A short-hand reporter testified that defendant made a statement December 4, 1950, in the hospital at which time he said: "I was going to work and my wife was going to take the car back home with her and come after me after work, and there's a little rise right where this happened and goes down to 48th Street, and when I stepped on the gas the back end whipped right around on me - turned plumb around and hit the culvert". He further stated to the

and he had some friends at home; that just before the war he had been over the hill and had lost control of his car, swerving to the left side of the road; that he had been arrested at that time for driving; that he was late for work and that was why he was late for school.

[illegible]

He further stated to the jury that he stepped on the back and whipped right around on the victim where this happened and got down to get the knife, and when he came after he after work, and there's a little time and going to work and my wife was going to take the car back home December 14, 1950, in the hospital he killed him in a room. A room and reported testified that defendant made a stab-

reporter that the pavement was wet, there was some loose gravel on it; he was driving in the middle of the twelve foot black-top road about thirty-five to forty miles per hour; he went off the road on the left hand side; the front wheels stayed in the middle of the road; the car slid thirty to thirty-five feet into the culvert; he had had two glasses of beer in a tavern about ten o'clock that morning.

As to whether conduct is wilful and wanton, no set rule has ever been furnished, each case depending on the particular facts and circumstances of such case. An analysis of the above evidence as to the conduct of the defendant indicates that ^{it} ~~there~~ cannot be said as a matter of law that such conduct was mere negligence and did not amount to wilful and wanton misconduct, by reason of which the same becomes an issue of fact upon which the jury should be permitted to pass. Under such circumstances it was error for the trial judge not to permit such case to go to the jury.

The judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Mr. Justice Carroll took no part in the consideration or decision of this case.

reported that the defendant had been seen at the scene of the crime; he was driving in the middle of the twelve foot black-top road about thirty-five to forty miles per hour; he came off the road on the left hand side; the front wheels skidded in the middle of the road; the car slid thirty to thirty-five feet into the ditch; he had had two glasses of beer in a restaurant about ten o'clock that morning.

As to whether conduct is willful and malicious, the law has never been furnished, each case depending on the particular facts and circumstances of each case. In the case of the above evidence as to the conduct of the defendant, the case must be decided by the jury and did not amount to willful and malicious conduct by reason of which the state recovered an issue of fact upon which the jury should be permitted to pass. In such circumstances it is error for the trial judge not to permit such case to go to the jury.

The judgment of the Circuit Court is reversed and the case is remanded for a new trial.

Reversed and remanded.

Mr. Justice Garroll took no part in the consideration or decision of this case.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

A

February Term, A. D. 1953.

General No. 9813

Agenda No. 1.

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

Vs.

CARL BEARD,

Plaintiff in Error.

3313
Writ of Error
To the Circuit Court
of Macon County, Illinois.

REYNOLDS, J.

349 I.A. 465²

Plaintiff in error was indicted for burglary in the October, 1948 term of the circuit court of Macon County and on November 12, 1948, he entered his plea of guilty to the indictment and made application for probation. On November 18, 1948, an order was entered admitting plaintiff in error to probation for a period of one year.

On September 12, 1949, the probation officer filed his report that plaintiff in error had violated the terms of his probation and a rule was entered on plaintiff in error to show cause why his probation should not be terminated.

On October 21, 1949, the People filed an amended petition for revocation of probation and for sentence on his plea of guilty. Hearing on the amended petition was held on October 26, 1949, and the court found that plaintiff in error had violated each of the conditions as set forth in the amended petition and entered its order revoking probation and sentenced plaintiff in error on his original plea of guilty to the penitentiary for a term of from one year to life.

Plaintiff in error urges that the record does not show wherein he violated his probation so as to justify its revocation and the imposition of sentence.

12801

STATE OF ILLINOIS
APPELLATE COURT
SECOND DISTRICT

February Term, A. D. 1953.

Exhibit No. 1.

General No. 9813

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

v.

CLAUDE W. BIRD,
Plaintiff in Error.

RECORDS, 1.

8491A.465

Plaintiff in error was indicted for burglary in the second degree, 1948, and the circuit court of Cook County, and on November 13, 1948, he entered his plea of guilty to the indictment and same was accepted for probation. On November 18, 1948, an order was entered admitting plaintiff in error to probation for a period of one year.

On September 12, 1949, the probation officer filed his report that plaintiff in error had violated the terms of his probation and a writ was entered on plaintiff in error to show cause why his probation should not be terminated.

On October 11, 1949, the people filed an amended petition for revocation of probation and for sentence on the plea of guilty. Hearing on the amended petition was held on October 25, 1949, and the court found that plaintiff in error had violated each of the conditions as set forth in the amended petition and entered its order revoking probation and admitting plaintiff in error to his original plea of guilty to the indictment for a term of from one year to life.

Plaintiff in error argues that the record does not show wherein he violated his probation so as to justify the revocation and the imposition of sentence.

An examination of the record reveals that on November 18, 1948, the court entered its signed order admitting plaintiff in error to probation and setting forth the conditions upon which he should be released. Among the conditions imposed upon his release appears the following: "That the defendant shall not, during the term of his probation, violate any criminal law of the State of Illinois or any ordinance of any municipality of said State." Other conditions were imposed which are not pertinent in this matter.

Paragraph

Section 787, Chapter 38, Revised Statutes of Illinois, reads in pertinent part as follows: "Release on probation shall be upon the following conditions: (1) That the probationer shall not, during the term of his probation, violate any criminal law of the State of Illinois, or any ordinance of any municipality of said State." Clearly the condition against violation of the criminal law contained in the order admitting plaintiff in error to probation was a proper condition of release.

An examination of the amended petition for revocation shows that plaintiff in error is charged, in paragraph 4 thereof, with violating his probation in that, "he violated the criminal laws of the State of Illinois on September 3, 1949, in that he, together with one Floyd Murray, an ex-convict, agreed and conspired together and laid out a plan of action to rob, steal and take away a certain motor vehicle, the property of Eva Thompson, and thereafter did rob, steal and take away the said automobile from Gilbert Colberg on September 3, 1949."

On the hearing held on this amended petition, it appears that plaintiff in error was present in person and was represented by counsel and that evidence was adduced in support of the charges made in the petition. A transcript of the evidence taken on this hearing furnished to this court reveals that one Walsher, called in behalf of the People, testified that he had overheard a conversation between the plaintiff in error and one Floyd Murray in which

they revealed their plan to "roll Colberg". That he later, on the 3rd day of September, 1949, saw plaintiff in error get into a car with Colberg and drive away and that on the 18th day of September, 1949, he had a conversation with Carl Beard and Floyd Murray in which they said that they "rolled" Colberg and took the automobile. One Virginia Crawley testified that on the evening of September 3rd, 1949, she was in a car with plaintiff in error and Floyd Murray and that they were arrested by a state policeman. One Richard Brown testified that on September 3rd, 1949, he met plaintiff in error, Murray and Colberg and that plaintiff in error and Colberg drove away in a car and that Murray then stated to him that plaintiff in error was going to hit the man and take his car. Brown further testified that later he had a conversation with plaintiff in error and Floyd Murray in which they admitted that they had hit Colberg and taken his automobile. One Beverly Caldwell testified that on September 3rd, 1949, she was in an automobile with plaintiff in error and that they were arrested by the state police who informed them that the car was stolen.

Plaintiff in error alleges that this evidence was inadmissible against him on the hearing for the reason that he had previously been indicted for robbery upon the same facts alleged in paragraph 4 of the amended petition for revocation and that trial on that indictment was commended and, after the jury had heard some evidence, the State's Attorney nolleed the indictment for robbery stating that perjury had intervened in the testimony of one Colberg. Plaintiff in error contends that the trial upon that indictment constitutes a bar to a proceeding to revoke his probation for the same offense.

In the case of People v. Kuduk, 320 Ill. App. 610, the State's Attorney sought revocation of probation on the ground that the defendant there had been indicted for driving an automobile while under the influence of intoxicating liquor. It appears that defendant had been tried and acquitted of that charge. It was argued that the acquittal was res judicata of the matter on a proceeding to

they revealed their plan to "kill" Goldstein. That he later, on the
17th day of September, 1947, was admitted in error into a car in
Colorado and drive away and that on the day of September, 1949,
he had a conversation with Earl Hunt and Lloyd Hunt in which they
said that they "killed" Goldstein, and that was responsible.
Allegation counsel admitted that on the evening of September 17, 1947,
he was in a car with Plaintiff in error and Lloyd Hunt and that
they were stopped by a white policeman. One witness stated that
that on September 17, 1947, he was Plaintiff in error, Hunt and
Goldstein and that Plaintiff in error and Goldstein drove away in a car
and that Hunt was placed in the car with Plaintiff in error was not
to sit in the car and Hunt did not. Hunt further admitted that later
he had a conversation with Plaintiff in error and Lloyd Hunt in
which they admitted that they and his Goldstein and Hunt were the
mobile. One Beverly Caldwell testified that on September 31, 1947,
she was in an automobile with Plaintiff in error and that they were
stopped by the state police and informed that they were the day was
closed.

Plaintiff in error claimed that this evidence was inadmissible
against him on the hearing for the reason that he had previously
been indicted for robbery upon the same facts alleged in paragraph 4
of the amended petition for revocation and that trial on that in-
dication was commenced and after the jury had heard the evidence,
the state's attorney called the evidence for robbery against him
without any reference in the indictment of one Goldstein. Plaintiff
in error contended that the trial and that indictment constituted a
bar to a proceeding to revoke his probation for the same offense.
In the case of People v. Hunt, 22 Ill. App. 2d 610, 611
State's attorney sought revocation of probation on the ground that
the defendant there had been indicted for driving an automobile while
under the influence of intoxicating liquor. It was held that defend-
ant was not tried and acquitted of that charge. It was argued that
the indictment was the subject of the matter on a proceeding to

terminate his probation. In that case the court held the acquittal was not a bar to an inquiry into the facts on which the indictment was based for the purpose of determining whether probation should be terminated. In disposing of the question, the court further held that the charge under the indictment was criminal and was required to be proved beyond a reasonable doubt, while the matter on termination of probation required no such degree of proof. Under this holding the indictment for robbery alleged in the instant case and the proceedings thereunder did not render the matter res judicata on the later proceeding to revoke probation. The court below properly admitted evidence of that alleged offense on the hearing complained of here.

Plaintiff in error also urges that the court below erred in admitting this evidence for the reason it had previously been established as perjured. The only basis for this contention is the bare allegation by plaintiff in error in his pleadings here that on the trial on the indictment for robbery the State's Attorney nolledd the indictment and stated that one Colberg, a witness, had given perjured testimony. It does not appear in the record before us that the evidence adduced below was disputed on the hearing, nor does it appear that plaintiff in error offered any evidence in explanation or mitigation of the charge. He was represented by counsel and so far as appears, had an opportunity to defend the charge made against him in the instant matter. It also appears that the witness Colberg, whose testimony is alleged to have been characterized as perjured, did not testify on the hearing below, nor does plaintiff in error point out what testimony he refers to as perjured. There being nothing in the record on which to base this assignment of error, it must be dismissed as being without merit.

Paragraph 789 of Chapter 38, Revised Statutes of Illinois, 1951, provides that upon a hearing for revocation of probation, if the court shall be of the opinion that the interests of justice requires the imposition of sentence, the same shall then be imposed.

[illegible]

It is not to be understood as being without effect.

1951. Provides cost of a hearing for the purpose of knowledge. It
the court shall be of the opinion that the interests of justice re-
quire the inclusion of evidence, the court shall be required.

The revocation of probation is a matter within the discretion of the trial court and this court would not be warranted in disturbing the judgment below unless it appears that the court acted arbitrarily or abused its discretion. People v. Kuduk, 320 Ill. App. 610. Here the record discloses that the amended petition alleged facts which, if true, justified revocation of plaintiff in error's probation. A hearing was had on the matters alleged and plaintiff in error and his counsel were present. Testimony was taken in support of the charges made in the amended petition for revocation which tends to show that plaintiff in error committed the acts alleged. There is no requirement that on a probation proceeding the alleged violation be proved beyond a reasonable doubt. Plaintiff in error made no attempt to refute the testimony of the witnesses against him. The fact that the State's Attorney nolleed an indictment based upon the same facts does not prevent their consideration on a proceeding to revoke probation. On examination of the whole record, this court cannot find that the court below acted arbitrarily or abused its discretion in finding that plaintiff in error had violated the conditions of his probation or in imposing sentence on his plea of guilty to the crime of burglary.

The order and judgment of the circuit court of Macon County is affirmed.

Affirmed.

Mr. Justice Carroll took no part in the consideration or decision of this case.

The revocation of protection is a matter within the discretion of the trial court and this court will not be warranted in disturbing the judgment below unless it appears that the court acted arbitrarily or unreasonably. People v. Miller, 320 Ill. App. 620. Here the record discloses that the amended petition alleged facts which, if true, justified revocation of plaintiff's protection. A hearing was had on the matter alleged and plaintiff in error and his counsel were present. Plaintiff was taken in error of the court's case in the amended petition for revocation which tends to show that plaintiff in error committed the acts alleged. There is no requirement that on a petition prohibiting the alleged violation he prove beyond a reasonable doubt. Plaintiff in error made no attempt to refute the testimony of his witnesses against him. The fact that the State's attorney relied on evidence based upon the same facts does not prevent their consideration on a petition to revoke protection. On examination of the whole record, this court cannot find that the court below acted arbitrarily or unreasonably in its decision in finding that plaintiff in error had violated the commission of his protection or in imposing sentence on the basis of guilty to the crime of burglary. The order and judgment of the circuit court of Cook County is affirmed.

Affirmed.

Mr. Justice Carroll took no part in the consideration or decision of this case.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

3323

February Term, A. D. 1953.

General No. 9870

Agenda No. 13.

MERLE GOLDSBOROUGH,
Plaintiff-Appellee,

vs.

THURMAN W. McDavid, d/b/a/ VAN ZETTI
BAKING COMPANY AND WILLIAM EICHEL,
Defendants-Appellants.

Appeal from the
Circuit Court of
Macon County, Illinois.

349 I.A. 466

REYNOLDS, J.

This is a suit for property damages and personal injuries arising out of a collision between two automobile trucks at a street intersection in the City of Decatur, Illinois. Merle Goldsborough, the plaintiff was driving his coal truck in a westerly direction on West Harrison Street and approaching the intersection of said West Harrison Street and North Monroe Street. The defendant William Eichel, driving the bakery truck of Thurman McDavid, doing business as Van Zetti Baking Company, was driving north on North Monroe Street and approaching the intersection of said North Monroe Street with West Harrison Street. The two trucks collided in the intersection and both were damaged. Goldsborough brought his suit for \$50,000.00 damages, claiming property damage and personal injury to his back which was claimed to be a subluxated disk. The cause was tried by the Court without a jury, and the Court entered judgment for the plaintiff in the amount of \$900.00 and costs of suit. From that judgment the defendants appeal to this Court.

In the brief of the defendants, they do not contend that the judgment was excessive. The Court found that the testimony did not establish a back injury and found only for the plaintiff for his out of pocket expense and some allowance for pain and suffering. By implication at least, the defendants admit negligence

STATE OF ILLINOIS
APPELLATE COURT
FIRST DISTRICT

February Term, A. D. 1923.

Agenda No. 13.

General No. 9870

WILLIAM GOLDEN, JR.,
Plaintiff-Appellee,

JOSEPH W. McDevitt, d/b/a THE BAKERY
BAKING COMPANY AND WILLIAM GOLDEN,
Defendants-Appellants.

Memorandum.

This is a suit for property damages and personal injuries arising out of a collision between two automobiles at a street intersection in the City of Decatur, Illinois. The defendant, the plaintiff, was driving his car in a westerly direction on West Harrison Street and approaching the intersection of said West Harrison Street and North Monroe Street. The defendant William Gold, driving the bakery truck of McDevitt, doing business as Van Buren Bakery Company, was driving north on North Monroe Street and approaching the intersection of said North Monroe Street with West Harrison Street. The two trucks collided in the intersection and both were damaged. Gold brought his suit for \$50,000.00 damages, claiming property damage and personal injury to his back which was claimed to be a spinal disk. The cause was tried by the Court without a jury, and the Court entered judgment for the plaintiff in the amount of \$900.00 and costs of suit. From that judgment the defendants appeal to this Court.

In the brief of the defendants, they do not contend that the judgment was excessive. The Court found that the testimony did not establish a back injury and found only for the plaintiff for his out of pocket expense and some allowance for pain and suffering. By implication at least, the defendants admit negligence

on their part but contend that the plaintiff was guilty of contributory negligence and hence there can be no recovery on his part. Thus the only issue in this appeal is that of whether or not the plaintiff contributed to the accident by his own negligence. This is essentially a question of fact. There is no question, that taking into consideration the speed of both vehicles, the relative distances of each from the intersection, all things being equal, the car on the right has the right-of-way. Paragraph 165 of Chapter 95 $\frac{1}{2}$, Illinois Revised Statutes (1951) provides: "Except as hereinafter provided motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left." It is our opinion that the following is a clear statement of the law applicable in a case of this nature.

The Statutes of Illinois provide that vehicles driving upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left. A vehicle in approaching an intersection from the right, within the meaning of the statutes, is entitled to the right-of-way when on its left, on an intersecting street another vehicle is approaching, whose driver, in the exercise of due care and traveling at a reasonable rate of speed, would or should see that unless he yielded the right of way the vehicles could or would collide, or, stated another way, the driver of any automobile approaching an intersection from the right has the right-of-way over one approaching from the left, unless the car on the right is at such a distance, that if driven with due care, it will not reach the intersection until the

of the fact that the plaintiff was driving on com-
 monly recognized and known roads there can be no recovery on his
 part. The only issue in this case is that of whether or
 not the plaintiff contributed to the accident by his own negligence.
 This is essentially a question of fact. There is no question
 that taking into consideration the speed of both vehicles, the
 relative distance of each from the intersection, all things being
 equal, the car on the right has the right-of-way. In Chapter 95, Illinois Revised Statutes (1953) provides: "Ex-
 cept as hereinafter provided motor vehicles traveling upon public
 highways shall give the right-of-way to vehicles approaching along
 intersecting highways from the right and shall move the right-of-
 way over those approaching from the left." It is our opinion
 that the following is a fair statement of the law applicable in
 a case of this nature.

The Statutes of Illinois provide that vehicles driving
 upon public highways shall give the right-of-way to vehicles ap-
 proaching along intersecting highways from the right and shall move
 the right-of-way over those approaching from the left. A vehicle
 to approaching an intersection from the right, within the meaning
 of the Statutes, is entitled to the right-of-way when on the left,
 in an intersecting street another vehicle is approaching, when
 driver, in the exercise of due care and exercising as a reasonable
 rate of speed, would or should see that unless he yielded the right-
 of-way the vehicles could or would collide, or, stated another way,
 the driver of any automobile approaching an intersection from the
 right and the right-of-way over one approaching from the left,
 unless the car on the right is at such a distance, that it
 driven with due care, it will not reach the intersection until the

car from the left can, if driven with due care, pass the intersection in safety. A car approaching an intersection from the right does not have an absolute right-of-way under all circumstances over a car approaching an intersection from the left, but that the right-of-way is dependent upon the relative distances of the two cars from the intersection and the relative rates of speed of the two cars approaching the intersection and that the law does not contemplate that the Statute in regard to right-of-way may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it that with both cars running at rates of speed that are reasonable and proper, having regard to the traffic and the use of the way, the car approaching the intersection from the left will reach the line of crossing before the car from the right will reach the intersection, and in any case it is a question of fact to be determined by the jury whether or not the car on the right, approaching the intersection had the right-of-way over the car approaching from the left.

The above statement was paraphrased from the trial court's opinion.

In other words, each case depends upon its own facts and circumstances, and the Statute merely lays down a rule. In this case, the trial court heard the case without a jury. It has long been the law in this State that a reviewing court will not disturb findings of fact of a trial court, unless the finding is clearly and palpably erroneous. Western & Southern Life Insurance Co. v. Brueggeman, 323 Ill. App. 173; where the evidence is conflicting, the conclusions of the trial judge, who saw and heard the witnesses and had advantages not possessed by this Court in judging the weight of their testimony, the verdict should not be disturbed unless clearly wrong. City of Quincy v. Kemper, 304 Ill.

not from the left can, if taken with the fact, that the defendant
 is, in reality, a car approaching an intersection from the right
 does not have an absolute right-of-way over all circumstances
 over a car approaching an intersection from the left, and that
 the right-of-way is dependent upon the relative distances of the
 car from the intersection and the relative speed of approach
 of the two cars approaching the intersection and that the fact
 does not entitle the car to proceed in regard to right-of-way
 may be looked upon as not from the right is so far from the
 intersection at the time the car from the left enters upon it
 that with both cars running at rates of speed that are reasonable
 and proper, having regard to the traffic and the law of the way,
 the car approaching from the intersection from the left will reach the
 line of crossing before the car from the right will reach the
 intersection, and in any case it is a question of fact as to the
 fact whether or not the car on the right, ap-
 proaching the intersection and the right-of-way from the car
 approaching from the left.

The above statement was made by the trial
 court's opinion.
 In other words, each case depends upon the facts and
 circumstances, and the trier of fact must determine the facts.
 In this case, the trial court made the case without a jury. It was
 long held that in such a case a reviewing court will not
 disturb findings of fact of a trial court, unless the finding is
 clearly and palpably erroneous. People v. Southern Bell Telephone
Co., 172 Cal. 223, 100 P. 2d 177; where the evidence is con-
 flicting, the conclusion of the trial judge, who saw and heard
 the witnesses and had advantages not possessed by this court in
 judging the weight of their testimony, the verdict should not be
 disturbed unless clearly wrong. City of Los Angeles v. Aetna, 100 Cal. 223.

App. 303; Bellm v. Henry, 336 Ill. App. 525; the findings of the trial court, not clearly against the weight of the evidence will not be disturbed. Krutz v. Bour, 167 Ill. 536; People v. Coudy, 296 Ill. 263; findings of a court trying a case without a jury may not be set aside unless they are clearly and manifestly against the weight of the evidence. Lurie v. Newhall, 333 Ill. App. 173; where litigants waive jury and cause is tried by court sitting as a jury, court sits as jury on the law and facts and is the sole judge of credibility of witnesses and weight to be given their testimony, Andrews v. Matthewson, 332 Ill. App. 325. This court is not disposed to disturb the verdict of the trial judge, since the evidence is conflicting and his decision is a decision on facts.

We agree with the contention of the defendants that the plaintiff has a duty to exercise due care but the question as to whether or not the plaintiff in this case did exercise due care is a question of fact, that was decided by the trial judge. The case of Kirchoff v. Van Scoy, 301 Ill. App. 366, cited by the defendants is not applicable to this case, because in that case, the plaintiff did not look at all as he entered the intersection. There, there was no question of the exercise of due care, but a manifest lack of it.

For the reasons stated, the judgment will be affirmed.

Affirmed.

Mr. Justice Carroll took no part in the consideration or decision of this case.

one witness is conflicting and his testimony is a revelation as to my disposal of the money. The fact that the witness is not a party to the transaction and is not a party to the transaction is a fact which is not in dispute. The fact that the witness is not a party to the transaction is a fact which is not in dispute. The fact that the witness is not a party to the transaction is a fact which is not in dispute.

For the reasons stated, the judgment will be affirmed.

to the Commission and the Board of Directors of the
Company.

45784

SPRING PACKING CORPORATION,
a corporation,

Appellee,

v.

GEORGE WEBER, d/b/a WEBER TOOL
& ENGINEERING COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

349 I.A. 533

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is from a summary judgment, in favor of plaintiff, which found that plaintiff is "in equity" the owner of a certain patent application filed in the United States Patent Office on May 27, 1950, together with the invention or inventions covered thereby, and any and all other inventions embodied in the machine made by or for defendant Weber. The decree directed defendant to assign to plaintiff by warranty deed said patent application, together with all inventions disclosed or claimed therein. The form of warranty deed which defendant is directed to execute is embodied in said decree.

The complaint was for a declaratory judgment and alleged, inter alia, that plaintiff was engaged in, among other things, the business of manufacturing journal box packing, known as spring packing; that it had engaged in efforts to develop an improved type of machine for the production of such spring packing used for packing journal boxes on railroad cars; that defendant approached plaintiff's president and represented that he could design and build

such a machine and offered to do so; that defendant was authorized to make a survey, inspection and appraisal of an experimental machine, for which services plaintiff paid defendant; that plaintiff authorized defendant to make a preliminary drawing of the machine, for which defendant was paid; that on or about March 31, 1948, defendant entered into an agreement with plaintiff that defendant would use his best efforts in a confidential employment to develop and design for plaintiff a special type of machine for the manufacture of spring packing, and would build one such machine and deliver it to plaintiff as soon as possible, for which defendant was to be paid not to exceed \$12,500; that the design of said machine, and any invention involved in its development, was to be the property of plaintiff, and plaintiff would have the right to make and have made for it additional machines; that defendant agreed to devote his best efforts in a confidential employment to design and develop such an improved type of machine; that plaintiff performed all of the conditions of said agreement and paid defendant the sum of \$24,500 for his services, design and manufacture of such machine; that defendant has neglected and failed to perform said agreement, in that he had refused and still refuses to assign to plaintiff any rights and interest in said machine, so designed and developed for plaintiff; that defendant, by letter dated January 18, 1950, notified Miller Waste & Manufacturing Company, which built and is using for plaintiff, at plaintiff's request, a machine which incorporates the design of said machine developed by

defendant for plaintiff under said agreement, that such use by said Miller Waste & Manufacturing Company is an infringement of the rights of defendant; whereupon, plaintiff notified defendant that it claims all patent rights to said machine and design thereof. The complaint prayed for a declaration of plaintiff's rights with respect to the matters alleged.

An answer was filed, in substance denying the claims of a confidential relationship between the parties, or that plaintiff gave any confidential information to defendant in respect to the design and manufacture of said machine, or that the inventions and design in connection with said machine were made for plaintiff, or that plaintiff was to have any right to any patents in connection with said machine; denying there was any understanding or agreement that the design or patent rights to said machine would belong to plaintiff; and alleging that the design of said machine was defendant's own design, and that the machine was made and sold to plaintiff for use by it in the manufacture of the spring packing.

Plaintiff made a motion for summary judgment, supported by affidavits and depositions, which in essence alleged the facts set up in plaintiff's complaint. In one of plaintiff's affidavits it was alleged that it was plaintiff's understanding that any patent or inventions relating to the new machine would belong to plaintiff; that defendant was considered as a confidant and was given full access to the research and engineering facilities of plaintiff; that the alleged confidential information given included the rate of speed of the conveyer, the number of springs per pound

the first of these is the fact that the system is not self-sufficient.

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The thirtieth is the fact that the system is not self-sufficient.

of waste, and the preferred method employed by plaintiff in embedding the springs in the waste.

Defendant filed counter-affidavits and depositions in support thereof, in which it is set forth that the alleged agreement between the parties on March 31, 1948, is evidenced by a written agreement of that date, attached as exhibit "A" to the answer of defendant; that said writing contains the entire agreement between the parties; that no mention is made therein of any inventions or patent rights to the machine; that it was defendant's understanding that if he made an invention during the course of filling plaintiff's order for the machine, the invention and patent rights would belong to him; that the price of \$19,500 was to be paid to defendant for the machine, whether or not he made any invention while building it, and that no consideration was paid for inventions or patent rights; that there was nothing of a confidential nature in the agreement or discussions between the parties; that plaintiff has no research or engineering facilities; that plaintiff never offered to purchase any invention or patent rights and never requested an assignment thereof, but ordered the building of a second machine by defendant; that thereafter plaintiff cancelled the order and had Miller Waste & Manufacturing Company build the second machine; that defendant informed plaintiff it was taking a risk in having the Miller company make the machine; that plaintiff then informed defendant that the machine was different, recognizing defendant's sole rights to the patent rights in the machine.

It denies that plaintiff furnished any confidential information to defendant; that the information with respect to the rate of speed of the conveyer was obtained by defendant by means of an engineer's instrument; that the number of springs per pound of waste could be ascertained from spring packing on the market, and the method of embedding the springs in the waste was old and disclosed in a prior expired patent, and that the alleged confidential information claimed by plaintiff was open to the public; that there was nothing secret or confidential about the speed of the processing machine; that said performance function was open to the public; that any skilled mechanic can synchronize machines; and that after the machine was built by defendant, plaintiff requested defendant to incorporate certain automatic features, which were additions to the machine, but plaintiff refused to pay in full for these additions, and defendant sustained a loss of about \$2,000.

Whether the facts set up in the counter-affidavits and depositions are true is not the question upon the motion for summary judgment. The controlling question upon such application was stated by this court in Zegarski v. Ashland Sav. Bank & Loan Assoc., 346 Ill. App. 535, 540. We there said:

"It has been repeatedly held that the purpose of a proceeding for a summary judgment is to determine whether or not a defense exists. Where a defense raising an issue of fact as the plaintiff's right to recover is set up, a summary judgment must be denied. To try an issue of fact by affidavits would deprive defendant of his right to a jury trial.

Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523; Barkhausen v. Naugher, 395 Ill. 562; Macks v. Macks, 329 Ill. App. 144; Searle & Funderburg, Inc. v. Fuhremann Canning Co., 340 Ill. App. 643."

The counter-affidavits and depositions, we think, clearly presented an issue of fact concerning which defendant is entitled to a hearing on the merits of the issues raised by the pleadings. Whether the cases relied upon by plaintiff or those relied upon by defendant, particularly Joliet Mfg. Co. v. Dice, 105 Ill. 649, 651, are applicable, depends upon how the disputed facts are ultimately found upon a final hearing. We, therefore, see no need at this time for discussing the applicable principle of law announced in the various cases cited by both sides.

The summary judgment is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED.

LEWE, P.J. AND KILEY, J., CONCUR.

45808

MILK BOTTLE CRATE COMPANY, an
Illinois corporation,

Appellee,

v.

JACOB I. RUSSAKOV and IRWIN J. RUSSAKOV,
copartners doing business under the firm
name of Russakov Company of America,
Not Inc.,

Appellants.

349 I.A. 534

APPEAL FROM

SUPERIOR COURT,

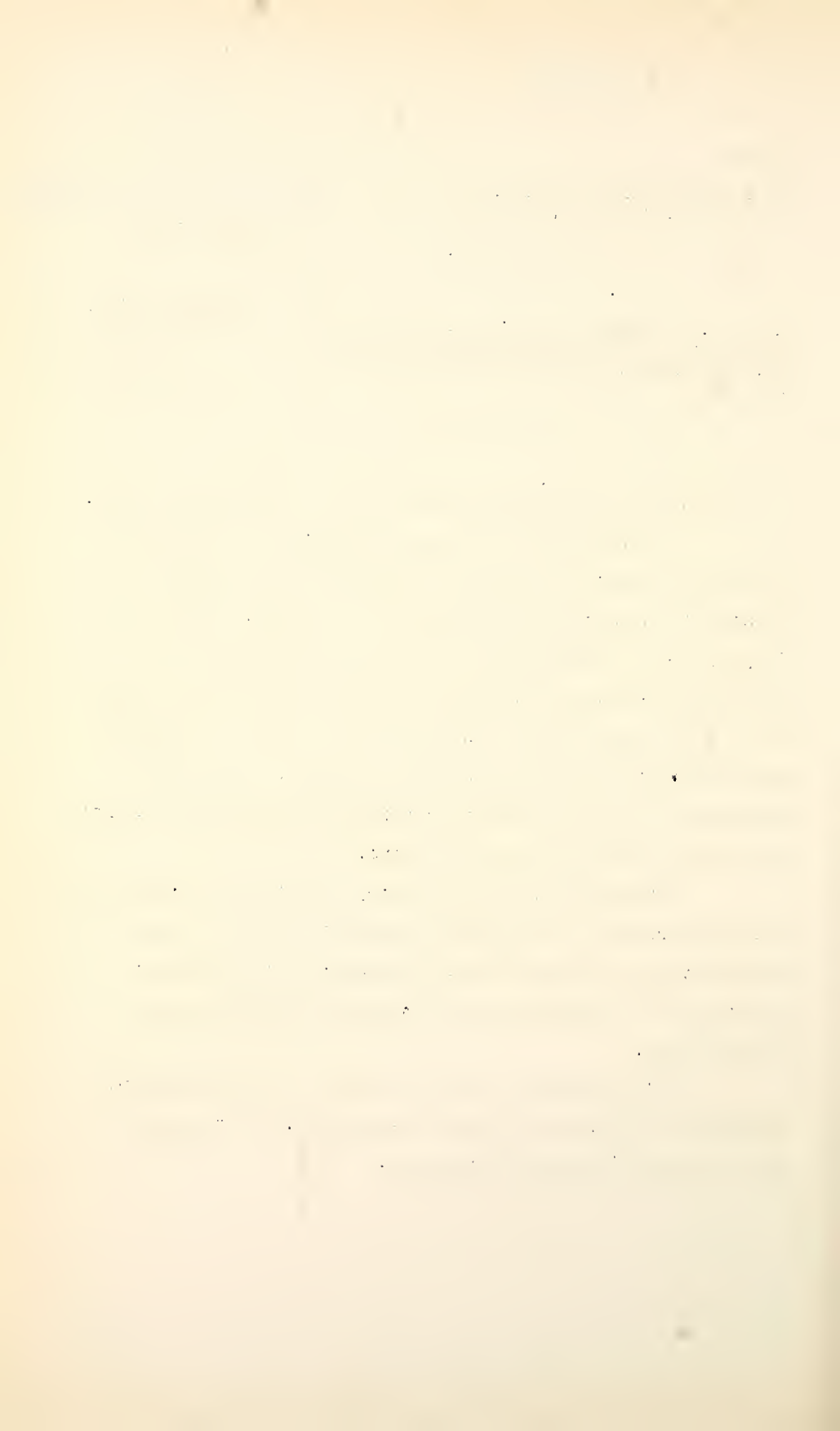
COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for a breach of two written orders, attached to the complaint as exhibits, signed by defendants and accepted by plaintiff, each dated July 8, 1946. One order called for the manufacture and delivery by plaintiff of 100,000 chair backs, and the other for 100,000 chair seats. The complaint alleged that there had been partial delivery under said orders, accepted by defendants, but that defendants refused to accept any further deliveries under said written orders.

Defendants filed an answer, alleging that plaintiff had breached the contract because it failed to make the deliveries required by the contract; that defendants cancelled said orders; and that plaintiff agreed to said cancellation.

Upon a hearing without a jury, the court entered judgment in favor of plaintiff for \$12,716.34, as damages for defendants' breach of contract.



The evidence establishes the following facts: that defendants had given plaintiff orders for similar chair backs and seats prior to the time of the orders in question; that at the time of the instant orders, plaintiff had not completed delivery upon such prior orders; that at the time of the two written orders in question, defendants informed plaintiff of a special sales promotion campaign which they were about to launch; that these orders were given in contemplation thereof, and that it was necessary, in order to carry on said sales promotion campaign, that plaintiff make prompt deliveries as called for in said written contracts; that plaintiff did not have sufficient raw material on hand with which to manufacture the chair backs and seats, and assured defendants that it would immediately order the same and would make prompt deliveries; that the orders were then executed and forwarded to plaintiff, calling for payment of \$15 per hundred for the backs and seats; that when plaintiff received the orders on July 10, 1946, it notified defendants that it would have to increase the charge to \$15.60 per hundred, to which defendants agreed, and each of the parties changed the price on their respective copies of the orders to \$15.60 per hundred; that no other change or revision in the written orders was requested by plaintiff; that each of the written orders specifically provided for delivery by plaintiff to defendants of 25,000 sets "at once," 50,000 on September 15, 1946, and 25,000 on October 15, 1946; that no deliveries were made under these written orders, the orders having been cancelled about August 15, 1946, and whatever chair seats and backs it thereafter delivered to defendants were on subsequent

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in financial matters. The text suggests that organizations should implement robust systems to track income, expenses, and assets, ensuring that all data is up-to-date and easily accessible.

2. The second section focuses on the role of internal controls in preventing fraud and mismanagement. It outlines various measures that can be taken to strengthen these controls, such as separating duties, requiring approvals for significant transactions, and conducting regular audits. The document stresses that a strong internal control system is not only a defense against fraud but also a means to improve operational efficiency.

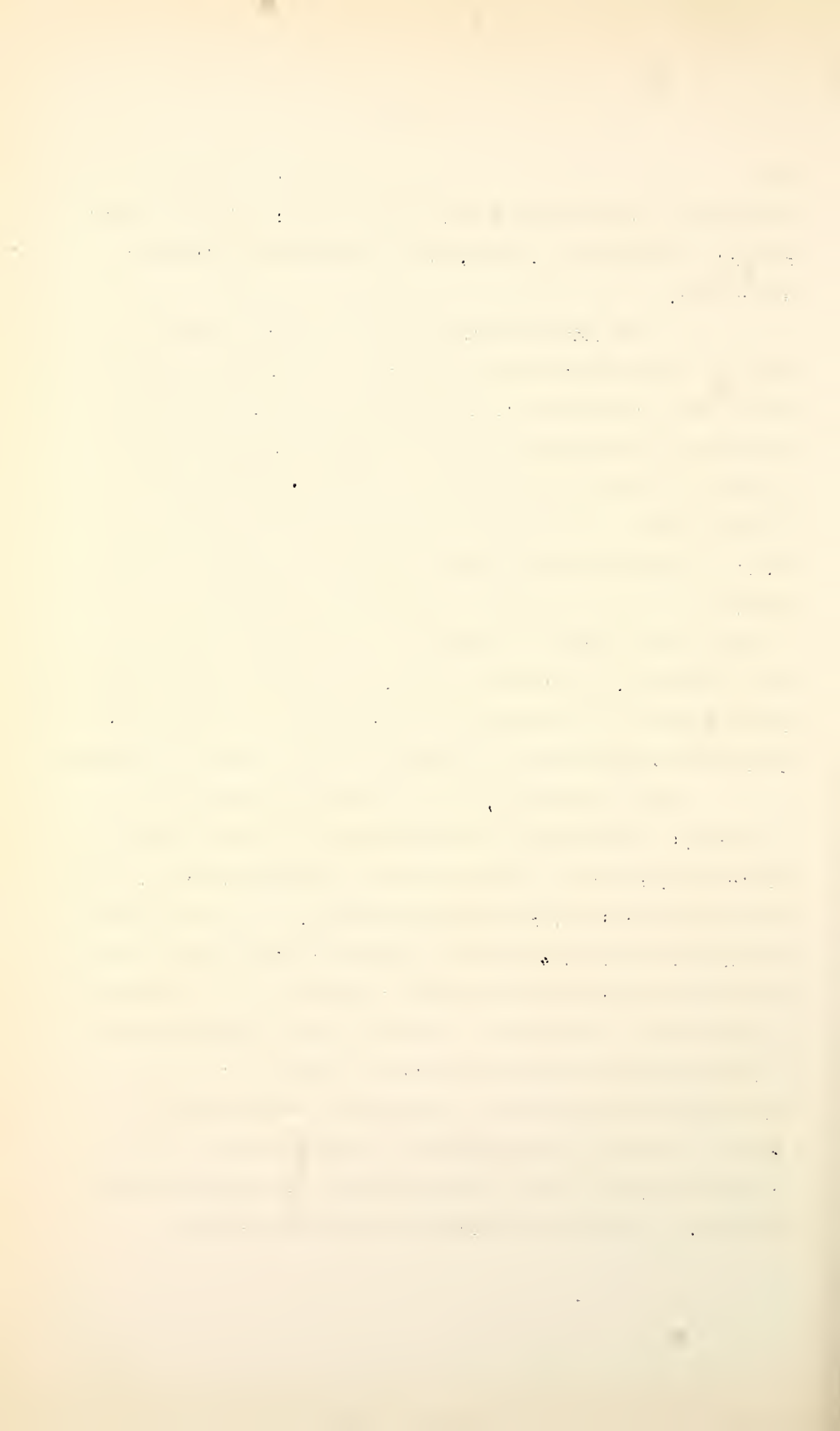
3. The third part of the document addresses the importance of communication and collaboration within an organization. It argues that clear communication channels and a culture of openness are vital for the success of any project or initiative. The text encourages leaders to foster an environment where team members feel comfortable sharing ideas, concerns, and feedback, which can lead to better decision-making and problem-solving.

4. The final section discusses the need for continuous improvement and adaptation. It notes that organizations must be willing to learn from their experiences, both successes and failures, and make necessary adjustments to their strategies and processes. The document suggests that regular reviews and evaluations can help identify areas for improvement and ensure that the organization remains relevant and competitive in a changing market.

orders given by defendants from time to time; and that it was not until September 15, 1946, that defendants received any deliveries.

It is undisputed that at the time the orders in question were accepted by plaintiff, it did not have enough raw material with which to manufacture the items and make delivery of 25,000 sets of each "at once." Plaintiff's own evidence discloses that on July 10, 1946, plaintiff sent a written order to its source of supply for the material in question, which written order called for the first delivery August 1, 1946, and called for additional shipments of one freight car of material September 1, October 1, November 1, and December 1, 1946, respectively. The written acknowledgment in evidence from the plaintiff's source of supply confirmed the order given by plaintiff and the dates of shipment.

About August 15, 1946, defendants complained to plaintiff's representative of plaintiff's failure to make deliveries, and that its failure was seriously interfering with defendants' sales promotion campaign. It was then that defendants notified plaintiff's representative that it was cancelling the two written orders in question, since they no longer were in a position to carry on their sales promotion campaign, due to plaintiff's failure to make deliveries. Defendants would continue to manufacture chairs, and if plaintiff was willing, defendants would from time to time order such quantities of backs and seats as their need might require. Plaintiff then agreed to such arrangement.



It further appears from the evidence that about the middle of November, 1946, defendants advised plaintiff's representative that they had a new design of chair back, which called for a curved back, which they wanted to order from plaintiff; that a sketch of the new design was submitted to plaintiff, and later the price agreed upon for the manufacture of the new design was fixed at \$22.50 per hundred; that the first delivery of the new design was made in the latter part of November of approximately 113 sets of each; that deliveries to defendants of such new design continued from time to time as defendants ordered them; that about July, 1947, defendants changed their design of chair seat and submitted a sketch of the new design to plaintiff, and plaintiff fixed the price of \$17.50 per hundred for such new design; and that about August, 1947, a further increase in price was agreed upon as to the chair back.

On cross-examination, plaintiff's witness Kurz, with whom defendants negotiated the instant orders, testified: "Shortly after the first of the year 1948 Mr. Irwin Russakov told us they were going to discontinue the manufacture of seats and I spoke to him with respect to a lot of material on hand. We hadn't delivered to them all of the finished items as ordered in orders number 154 and 155 [which were the instant orders]. I asked Mr. Russakov what he wanted us to do with the material that we had on hand undelivered. He told me that was our problem and I told him we thought it was his and I told him that we should both try to get rid of the raw material."

It was not until February 10, 1948, when by letter to the defendants under that date, plaintiff for the first time made any claim for alleged refusal and failure of the defendants to accept deliveries under the instant orders. This was after plaintiff was advised defendants would discontinue the manufacture of chairs.

It appears to us incredible that a business concern like plaintiff would as late as November, 1946, and again in July, 1947, accept new orders from defendants, with change of the design of the chair back and seat and an increase in price per hundred, if at that time the defendants breached the instant contracts by refusing to accept any deliveries under the instant orders, and after defendants in the middle of August, 1946, notified plaintiff of the cancellation of the instant orders. We think that plaintiff's dealings with defendants subsequent to the middle of August, 1946, at which time defendants claim they cancelled the orders in question, tend very strongly to corroborate defendants' claim of such cancellation and acceptance thereof by plaintiff. That plaintiff was guilty of a breach of its contract for delivery of the items in question is quite clear from the evidence. It is undisputed that plaintiff was in no position when it accepted the orders to make the "at once" delivery of 25,000 sets of each, as called for by the instant orders.

Plaintiff's witness Kurz, in his testimony, undertook to explain the failure of plaintiff to make the "at once" delivery. He testified that in a conversation with defendants, before the written orders were received by plaintiff, defendants agreed that they would not hold plaintiff to the require-

ment of the delivery specified in the written orders. Such evidence cannot be considered, since it violates the rule of law that all verbal understandings or agreements prior to the written contract are merged in the written instrument and cannot be considered to vary the terms of the written contract. Sallo v. Boas, 327 Ill. 145; Clark v. Mallory, 185 Ill. 227; Larson v. Material Service Corp., 331 Ill. App. 430, 434. It is reasonable to assume that if such an understanding occurred prior to the receipt of the instant orders, plaintiff would have taken the ordinary precaution of making the change in the written orders with respect to the terms of delivery, as it did about the price change.

The witness Kurz also testified to an alleged understanding with defendants, after the written orders had been accepted, that defendants would waive the requirements of delivery called for by the instant orders. The burden of proving such waiver was upon the plaintiff. In Boardman v. Bubert, 325 Ill. 38, 41, the court said:

"Where one of the parties contends that the contract has been modified the burden is on him to prove his claim."

Plaintiff has failed to sustain the burden of proving waiver. The clear and manifest weight of the evidence is that defendants did not waive the requirements of delivery in the instant orders.

We conclude, upon this record, that plaintiff was not only guilty of a breach of the contracts sued upon, but that the contracts in question were cancelled by defendants because of such breach, and that plaintiff acquiesced in such cancellation.



The trial court should have found for the defendants and entered judgment in their favor. Under sections 87 and 92 (1) (e) of the Civil Practice Act, Ill. Rev. Stat. 1951, Ch. 110, we may enter such judgment as the trial court should have entered upon this evidence. In New York Central R. R. Co. v. City of Chicago, 332 Ill. App. 583, this court followed the doctrine of Levinson v. Spector Motor Service, 389 Ill. 466. We said:

"In the non-jury cases, though the evidence is in conflict, we may make findings of fact different from the finding of the trial court."

In Ebbert v. Metropolitan Life Ins. Co., 369 Ill. 306, 309, the court, in construing section 92 of the Civil Practice Act, said:

"From this language it is clear that the power of a reviewing court to reverse without remanding is not limited to cases in which there is no evidence tending to support the judgment of the trial court, when a jury has been waived."

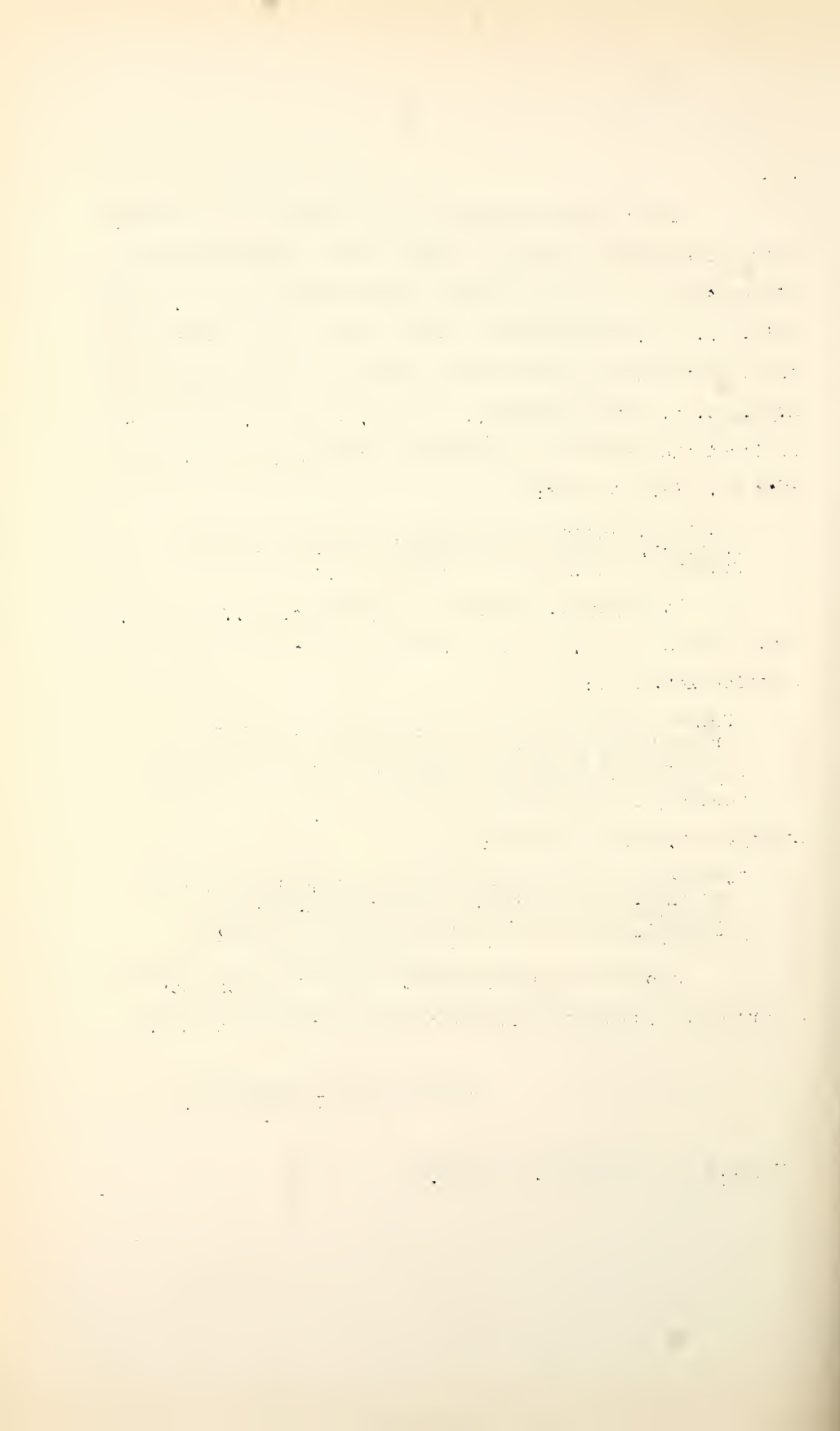
At page 310, the court said:

"We adhere to the reasoning of the Mirich case, and hold that, when a jury has been waived, the Appellate Court may reverse without remanding, although there is a conflict as to the facts."

Accordingly, the judgment of the Superior Court is reversed and judgment is here entered for the defendants.

REVERSED AND JUDGMENT HERE.

LEWE, P.J. AND KILEY, J., CONCUR.



ESTELLE NOBLE,
Appellant,
v.
WALTER NOBLE,
Appellee.

349 I.A. 535

Plaintiff appeals from a decree of the Superior Court granting defendant a divorce on the ground of desertion, and from two subsequent orders, one denying plaintiff's motion to vacate the decree for alleged error apparent on the face of the record, the other denying plaintiff's petition for rehearing.

On June 21, 1948 defendant filed a motion to strike and dismiss the complaint on the ground that he was a

resident of the Town of Fox Lake, McHenry County, and that as a consequence thereof the court was without jurisdiction of the cause. After hearing, this motion was denied, and defendant was ruled to answer. His answer, filed July 22, 1948, admitted that plaintiff was a resident of Cook County, but expressly averred that he was a resident of Lake County; it further averred that plaintiff failed to discharge her duties as a wife, that she had been guilty of maintaining correspondence with divers male friends, that she frequented taverns in the company of strange men, neglecting her household duties and failing to attend to the wants of the minor child; it denied that plaintiff had lived separate and apart without fault on her part, but averred, rather, that she had lived separate and apart solely for the purpose of being free of her marital obligations. On June 29, 1950, two years after filing his answer, defendant was granted leave to change attorneys, and, by separate order entered the same day, he had leave to file a counterclaim for divorce, alleging that his wife on April 30, 1948 deserted and absented herself from him, without cause or fault on his part, for a space of more than one year commencing from that date and continuing thereafter. In her reply to the counterclaim, filed July 21, 1950, plaintiff put the alleged desertion in issue.

The case was heard as a contested matter on January 22, 1952, pursuant to which a decree was entered granting defendant a divorce on his counterclaim, awarding the custody of the child to plaintiff, directing defendant to pay plaintiff

the sum of \$17.50 weekly for the support of the child, as well as \$150.00 for attorneys' fees, and dismissing the complaint for separate maintenance for want of equity.

On February 19, 1952, after entry of the decree, plaintiff had leave to substitute new counsel and also to file a motion to vacate the decree for error apparent on the face of the record, and to file a petition, supported by affidavits, for rehearing, and two days later she was granted leave to file an amended motion to vacate the decree and to file her petition for rehearing.

In her amended motion to vacate the decree for error apparent on the face of the record, plaintiff alleged that the time during which her suit for separate maintenance was pending after May 26, 1948 must be deducted in the computation of the statutory one-year period of desertion required as a ground for divorce, and that in consequence thereof the counterclaim failed to allege a cause of action, and that there could not be, as a matter of law, on the face of the record, desertion by plaintiff.

The amended petition for rehearing recited the proceedings in the cause and emphasized that the period beginning May 26, 1948 and continuing to the filing of defendant's counterclaim on June 29, 1950, and through the subsequent litigation, was "time cut" in the computation of the one-year continuous desertion fixed by statute relative to determining the question of plaintiff's alleged desertion; it also alleged that a court reporter was present at the hearing, that written demand had been made

upon plaintiff's former attorney and defendant's counsel for the name and address of such reporter so that the proceedings might be written up, certified by the chancellor and filed with the clerk of the court, but that both attorneys had refused to divulge the requested information; the amended petition prayed that the chancellor hear the testimony of plaintiff's additional witnesses, and order that plaintiff be supplied with the name and address of the court reporter who had attended the hearing. The affidavits supporting the amended petition alleged facts pertaining to defendant's abandonment.

As the principal ground for reversal it is urged that the decree awarding defendant a divorce on the ground of desertion is erroneous on the face of the record, since plaintiff's suit for separate maintenance was pending and undisposed of throughout the alleged period of desertion. Plaintiff relies principally on Floberg v. Floberg, 358 Ill. 626, Holmstedt v. Holmstedt, 383 Ill. 290, Joslyn v. Joslyn, 337 Ill. App. 443, and other cases holding that the pendency of a separate maintenance suit stops the running of the statutory period of desertion, as does the subsequent **filing** of a suit for divorce. However, section 1 of the Divorce Act (Ill. Rev. Stat. 1951, ch. 40, par. 1) was amended and, in its amended form, became operative on July 11, 1951, more than a year after defendant's counterclaim had been filed on June 29, 1950. The amendment provides that "if during the period of any desertion which if uninterrupted for one year would be a ground for divorce under this Act litigation for either

divorce or separate maintenance shall pend between the parties, the time so consumed by said litigation shall not be deducted in any computation of the desertion period." Defendant takes the position, and the chancellor evidently was of the opinion, that this amendment operated retrospectively so as to make separation existing prior to its enactment legal desertion and a ground for divorce, whereas before amendment (during the actual separation of the parties here) the law was that the time of desertion could not run during litigation; in other words, the court construed the statute as in the nature of an ex post facto law. It may be conceded that, as a general rule, legislative enactments will not be construed retroactively. However, we think there is an exception to this rule, as stated in People v. Clark, 283 Ill. 221, as follows: "When the law only affects the remedy or procedure, the rule in this State is that all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law and without regard to whether the suit had been instituted or not, unless there is a saving clause as to existing litigation." In re Petition of Monico, 287 Ill. App. 540, Weil-McLain Co. v. Collins, 395 Ill. 503, and C. & W. I. R. R. Co. v. Guthrie, 192 Ill. 579, are to the same effect. Plaintiff's contention that the change in the amendment to the Divorce Act did not merely change the remedy or procedure but affected substantive rights, is effectively answered in the Clark opinion, where a similar contention was made. In the case at bar, the amendment to the Divorce Act did

not affect any substantive right of the plaintiff; it merely affected the remedy. The decree for divorce was not entered until January 22, 1952, several months after the amendment became effective. We therefore hold that the doctrine enunciated in People v. Clark and the other decisions cited is controlling.

There is no merit to the contention that the chancellor abused his discretion in failing to require counsel to disclose the name of the court reporter. Court reporters are retained by parties to preserve the record for their own protection. Attorneys usually, as a matter of courtesy, make the transcript of the evidence available to the opposing party, but plaintiff cites no cases requiring that this be done, and we know of none. The chancellor, after hearing plaintiff's witnesses, concluded that she had not maintained her complaint for separate maintenance, dismissed it for want of equity and entered the decree for divorce in favor of defendant upon facts which we must assume were sufficient to justify the entry of such decree.

Accordingly, the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

NIEMEYER, J., and BURKE, J., Concur.

45878

WEIGHTSTILL WOODS,
Appellant,
v.
MEMORIAL ESTATES, INCORPORATED,
Appellee.

} APPEAL FROM
} SUPERIOR COURT
} COOK COUNTY

349 I.A. 535²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree of the Superior Court dismissing his complaint for want of equity.

Plaintiff was appointed attorney for the Chicago Title and Trust Company, receiver, in the case entitled Lynch Brothers, Copartners, v. All Saints Greek Orthodox Cemetery, Inc., et al., Gen. No. B-196 112, in the Circuit Court of Cook County, a proceeding to reorganize a corporation of the State of Illinois, which was the predecessor of Memorial Estates, Incorporated (hereinafter referred to as Memorial), defendant herein. By decree of May 31, 1938, plaintiff was awarded the sum of \$3000.00 for legal services. That decree was confirmed September 25, 1942 by a subsequent decree in the same suit continuing the lien upon the property of Melrose Memorial Corporation, the legal successor of the original defendant. On January 9, 1943, the sum of \$1250.00 was paid to plaintiff in partial satisfaction of the original decree. Under the terms of the decree of September 25, 1942, final payment of the balance became due on December 10, 1944, and the unpaid balance, with interest, was to remain a lien upon all property of Memorial.

It appears of record that on January 9, 1943 plaintiff had received the sum of \$1250.00 on account of his fees as attorney for the receiver and executed the following document: "Received today from MELROSE MEMORIAL CORPORATION its check No. 26, drawn to my order, for One Thousand Dollars (\$1,000.00) on the LaSalle National Bank of Chicago, for credit on the collateral note of the MELROSE MEMORIAL CORPORATION, dated July 20, 1942, in the amount of Three Thousand Dollars (\$3,000.00), less credits thereon, and the note of Roy Hatten and George A. Cokins for One Thousand Dollars (\$1,000.00), less credits thereon, dated July 20, 1942, which said notes and the collateral therein described, consisting of Certificate No. 20 for four hundred (400) shares of capital stock of the MELROSE MEMORIAL CORPORATION, were received by me for professional services in case B-196112 in the Circuit Court of Cook County. When the said check of One Thousand Dollars (\$1,000.00) shall have been paid by the bank and the additional sum of Eight Hundred Dollars (\$800.00) shall have been paid to me on or before January 25, 1943, and this interim receipt shall have been returned to me, I will then surrender to George A. Cokins, Vice-president of MELROSE MEMORIAL CORPORATION, the above described notes and the said collateral, Certificate No. 20 for four hundred (400) shares of capital stock of the MELROSE MEMORIAL CORPORATION. Should the MELROSE MEMORIAL CORPORATION or George A. Cokins fail to pay the sum of Eight Hundred Dollars (\$800.00) on or before January 25, 1943, then this writing shall be void and the payment



of One Thousand Dollars (\$1,000.00), evidenced by check No. 26, shall be applied to the face of the said notes."

In compliance with the provisions of the foregoing document, defendant turned over to plaintiff the collateral note of the corporation for \$3000.00, a note signed by Roy Hatten and George A. Cokins for \$1000.00, stock certificate No. 20 for 400 shares of capital stock of the corporation, and its check No. 26 for \$1000.00. Hatten and Cokins were officers of the defendant.

On January 25, 1943 defendant paid to plaintiff the balance of \$800.00 and received from him the collateral note for \$3000.00, Hatten and Cokins' note for \$1000.00 and the certificate for 400 shares of the capital stock of the corporation, and at the same time defendant returned to plaintiff the agreement of January 9, 1943. On January 30, 1943, plaintiff filed a partial satisfaction in the clerk's office. Defendant received no copy of this satisfaction, had no knowledge thereof and was unaware that it had been filed. It was not until the reorganization of the Melrose Memorial Corporation in 1949 that plaintiff, in connection with an audit of the affairs of the company then being made by Arthur Young and Company, auditors, claimed an additional \$1700.00 as due him, with interest at six per cent from July 20, 1942 to January 25, 1943.

In the course of the hearing the chancellor in the Superior Court, where the instant proceeding was instituted, was at a loss to understand how plaintiff had arrived at the additional figure of \$1700.00 which he claimed to be due him;

and, indeed, there is no explanation in the record of the additional claim. All that plaintiff was entitled to under the original decree of May 31, 1938 was \$3000.00. January 9, 1943 he had received \$1250.00 on account of his fees; subsequently he received \$1000.00, together with collateral mentioned in the receipt of January 9, 1943, and on January 25, 1943 defendant paid him the balance of \$800.00, or an aggregate of \$3050.00, and received from plaintiff the collateral note of the corporation for \$3000.00, Hatten and Cokins' note for \$1000.00, and the 400 shares of the capital stock of the corporation. The additional \$50.00 received by plaintiff more than compensated for any interest that could have accrued on the principal amount. If plaintiff thought that he had an additional \$1700.00 due him, it is difficult to understand why he would have surrendered the collateral notes and stock mentioned in the receipt of January 9, 1943. The chancellor was evidently of the opinion that the additional claim which was interposed some seven years after the matter had been settled was an afterthought, and stated to plaintiff that he was convinced, despite plaintiff's protestations, that "you accepted this in full payment and never had any idea of collecting any more."

The filing of the partial satisfaction by plaintiff was not binding on defendants who had no knowledge thereof, and has no probative value.

After a careful examination of the record we are convinced that the finding of the chancellor that plaintiff had been paid in full is amply supported by the evidence; therefore, the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

NIEMEYER, J., and BURKE, J., Concur.

45892

HALSTED AND 79TH BUILDING, INC.,
a corporation,

Appellant,

v.

DR. FRANCIS J. O'GRADY,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

349 I.A. 536¹

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action at law in the Municipal Court for rent claimed to be due it from defendant for the six-month period from June through November 1951, at \$50.00 a month, aggregating \$300.00. The trial judge, being advised by counsel for the respective parties that there was no controversy as to the facts, suggested that they submit their affidavits for summary judgment, which was accordingly done. Pursuant to hearing, the court entered judgment for defendant, from which plaintiff appeals.

The facts as presented in the statement of claim, the defense thereto, and the affidavits submitted, are that plaintiff, as owner of property at 7912 South Halsted street, entered into a lease with defendant on December 28, 1947 for premises known as office No. 4 of the building located at the foregoing address, to be used by defendant as a dental office. The term of the lease was for two years, commencing January 1, 1948 and terminating December 31, 1949, at a stipulated rental of \$45.00 per month for the first year, and \$50.00 per month for the second year. At the expiration of the lease no new agreement was entered into between the parties, but defendant continued to occupy the

premises, paying \$50.00 per month rental for the year 1950, and up to and including May 31, 1951. On April 21, 1951 defendant had served notice on plaintiff that he would vacate the premises on May 31, 1951, which he did. Thereafter the office remained vacant from June 1 to December 1, 1951, and by reason of that vacancy plaintiff claims to have sustained a loss of six months' rent, at \$50.00 per month.

Defendant's affidavit for summary judgment shows that : the written lease contained the following express provisions: "if and only if the Lessor serves written notice upon the Lessee of the Lessor's election thereof, such holding over shall constitute renewal of this lease for one year"; and "no receipt of money by the Lessor from the Lessee after the termination of this lease . . . shall reinstate, continue or extend the term of this lease. . . ." Plaintiff contends that, notwithstanding the foregoing provisions of the lease, defendant, by continuing in possession of the premises after the termination of the lease, became a holdover tenant with a year-to-year tenancy and liable under the terms of the original lease, and his counsel cites cases holding in effect that where a tenant under a lease for a year or more holds over after the expiration of the term, there being no new leasing agreement, the landlord may, at his election, treat the tenant as a trespasser and evict him, or treat him as a tenant from year to year thereafter upon the same terms as in the original lease; that a holding-over is presumed in law from mere continued occupancy by the tenant of rented premises

in the absence of proof of a new agreement between the parties; and that the right of election as to whether the tenant remaining in possession after the expiration of the lease is holding over upon the same terms as in the original lease is a right which belongs to the landlord and not to the tenant.

It may be conceded that where there is no proof of a contrary agreement between the parties, the principles of law urged by plaintiff are applicable. However, they are mere implications which may be rebutted by some act of one or both of the parties, or by specific provisions in the lease. "It is a well-settled rule that where there is an express covenant the law will not imply one." Taylor's Landlord and Tenant, 9th ed., vol. I, ch. vii, sec. 253, p. 318. In the instant case the quoted provisions of the lease clearly preclude the arising of a holdover tenancy by implication; effect must be given to the clear intentions of the parties expressed therein. Under these provisions plaintiff could elect to serve written notice on the lessee that holding-over would constitute a renewal of the lease; **it** either neglected or chose not to do so.

In the case at bar the implication of a holdover is expressly rebutted by the agreement of the parties under the express provisions of the lease. The weight attributed by courts to special provisions of this kind is demonstrated in Bell v. Groom, 224 Ill. App. 58, wherein the court ruled out the existence of a holdover because of a provision in

the contract between the parties, and said: "It is not an uncommon thing for a lease to contain a provision giving the lessee the right to renew it either upon the same or or other conditions, nor is it unusual for the lease to provide that the lessee may by exercising his option extend the lease for a definite period of time. But such renewals or extensions do not create a tenancy from year to year. The tenancy in such case is created by contract between the parties.

In the view we take, plaintiff is effectively barred from invoking operation of the doctrine of holdover by implication of law by having inserted in the lease which it drew, the provisions to which we have referred. The judgment of the Municipal Court is therefore affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, J., and BURKE, J., Concur.

45871

ROSE LA ROCCO

Appellant,

v.

ILLINOIS CENTRAL RAILROAD, an
Illinois corporation, and ILLINOIS
PUBLISHING AND PRINTING COMPANY,
d/b/a HERALD-AMERICAN, an Illinois
corporation,

Defendants.

ILLINOIS CENTRAL RAILROAD CO., an
Illinois corporation,
Defendant - Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

3491.A.336²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Rose La Rocco filed a complaint in the Circuit Court of Cook County against the Illinois Central Railroad Company and the Illinois Publishing and Printing Company for damages on account of personal injuries suffered on May 26, 1948. The latter paid plaintiff \$2,000 and received her "covenant not to sue." Thereupon the action was dismissed as to that corporation. A trial resulted in a verdict for \$5,000 against the railroad company, hereinafter called the defendant. The court granted defendant's motions for judgment notwithstanding the verdict and in the alternative for a new trial. Plaintiff appeals.

Defendant maintains as part of its suburban service its station east of Michigan Boulevard at Randolph Street in Chicago. The station is reached by a pedestrian subway under Michigan Boulevard. Doors, shown on a picture received in evidence, lead from the subway. The ticket office, also shown in the picture, is a short distance inside the door.

Passengers were invited to enter the station for the purpose of boarding the trains. Space^{was} used by lessees of defendant in selling various commodities, including newspapers and magazines, to persons passing through the station. On May 26, 1948, a sign was suspended from the ceiling near the ticket office bearing the legend "Illinois Central Railroad." It was 7 feet long, 6 inches wide, weighed 125 pounds and was suspended 6 feet 10-1/2 inches above the floor at three points by metal plates and 3/8 inch machine bolts. The distance from the ceiling to the floor was 8 feet 8 inches. About 4:30 that afternoon plaintiff's daughter-in-law, Mrs. Mary La Rocco, was in line at the ticket office. Plaintiff and a sister-in-law, Mrs. Frances Ruvoli, were standing ahead of the daughter-in-law. All three testified that plaintiff was suddenly struck by a falling sign. None of them gave any explanation as to the fall. The sign hit plaintiff on the head and she was thrown to the floor. She was removed to a hospital. As there is no contention that the damages are excessive, we refrain from discussing her injuries.

Leonard Marta, called by defendant, testified that he was employed by the Chicago Herald-American. The corporation which had been dismissed from the case publishes that newspaper. Marta stated that he came into the station carrying two and one-half bundles, each of 200 newspapers on his right shoulder; that they were being delivered to a stand in the station; that he struck the sign with the newspapers and knocked it down; and that he did not "notice" anything defective about the sign. Mrs. Fay Bawden, called

by defendant, testified that she was standing in the ticket line behind plaintiff. She said that "the sign was high enough that I could not touch it with my hand"; that she saw Marta with the papers, "quite high above his head - I don't know whether a foot or two feet"; that he struck the sign with the newspapers with sufficient force to break off one or more of the brackets; that the sign did not fall to the floor, but swung down and hit the plaintiff knocking her to the floor; and that Marta was walking at "a normal gate."

The theory of plaintiff is that she is entitled to recover under the doctrine of res ipsa loquitur. It is not disputed that at the time of the occurrence plaintiff was lawfully upon the premises and that she was in the exercise of due care for her own safety. Defendant maintains that plaintiff's present contention, her pleadings, proof and jury argument are inconsistent, pointing out that in Count I of the complaint she alleged that defendant maintained the sign in disrepair and that it "broke in its suspension" and struck her, and that Count II of the amended complaint averred that the sign was located 6 feet 10-1/2 inches from the floor and charged general negligence in its maintenance. Defendant calls attention to the fact that in his jury argument counsel for plaintiff repeatedly charged improper location of the sign and that the defendant should have anticipated that the sign would be struck by someone like Marta. This, in effect, is a charge of engineering negligence and of failure to anticipate the occurrence, neither of which was pleaded.

We will assume that plaintiff properly pleaded her case under the doctrine of res ipso liquitur and that the evidence introduced by her made out a prima facie case under that doctrine. In Bollenbach v. Bloomenthal, 341 Ill. 539, the court said that the presumption or inference of negligence raised by the application of this doctrine is rebuttable and cannot be treated as evidence; that presumptions are "never indulged in against established facts"; that they are indulged in only to supply the place of facts; and that as soon as evidence is produced which is contrary to the presumption which arose before the contrary proof was offered, the presumption vanishes. Plaintiff argues that the presumption does not vanish when the facts are shown and that the issue must be submitted to a jury, citing O'Hara v. Central Illinois Light Co., 319 Ill. App. 336, Oakdale Building Corporation v. Smithereen Co., 322 Ill. App. 222, and other cases. In the O'Hara case the court, after reviewing the evidence said (344): "We cannot say as a matter of law that in this case all presumptions of negligence vanished." In the Oakdale Building Corporation case the evidence showed that an unexplained fire broke out in a vacant apartment shortly after defendant's employee left. As the defendant offered no evidence, there was nothing to meet the presumption.

In the case at bar there was no proof that defendant was guilty of any negligence. The sign fell because it was struck with great force by an outsider. No engineering

negligence was pleaded as to the placement of the sign. The sign was well above the heads of those reasonably expected to use the station. The presumption that arose from the unexplained fall vanished in view of the positive proof showing the cause of the fall. Any presumption or inference arising from the circumstances of the occurrence vanished with the presentation of the undisputed evidence that plaintiff was injured because the sign fell when struck with great force by Marta. There are numerous cases wherein the attempted explanation by the defendant as to the cause of the occurrence failed to establish the facts, such as Krueger v. Friel, 330 Ill. App. 557; Siniarski v. Hudson, 338 Ill. App. 137; Edmonds v. Heil, 333 Ill. App. 497; Oakdale Building Corporation v. Smithereen Co., 322 Ill. App. 222; and Johnson v. Stevens Building Catering Co., 323 Ill. App. 212. The instant case did not present any issue of fact to be decided by the jury and the trial judge was right in entering judgment. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P. J., and NIEMEYER, J., Concur.

45958

M. L. ERLICH, d/b/a ACE PLUMBING
AND HEATING COMPANY,

Plaintiff - Appellee,

v.

PATRICK O'MAHONY, JULIUS P. BLAKELY
and MARION BLAKELY,

Defendants

PATRICK O'MAHONY,

Appellant.

349 I.A. 537

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

M. L. Erlich filed a complaint to enforce a mechanic's lien against Patrick O'Mahony, Julius P. Blakely and Marion Blakely on the premises commonly described as 6251 South Wabash Avenue, Chicago. The Blakelys were served by publication and defaulted. Patrick O'Mahony filed an answer joining issue on the material allegations. The case was referred to a master, who found that there was due and owing to the plaintiff for work, labor and materials furnished in improving the premises the sum of \$723,55, plus interest; that O'Mahony is the holder of title to the premises; and that plaintiff has a valid lien upon the premises for that amount. He recommended that a decree be entered in accordance with the prayer of plaintiff's complaint. Objections to the report stood as exceptions and were overruled and the court entered a decree in accordance with the recommendations of the master. O'Mahony, hereinafter called the defendant, appealed.

Defendant, a retired mail carrier, acquired the premises about 20 years ago. On May 1, 1947, he contracted to sell the premises to the Blakelys for \$10,000, payable in monthly installments of \$200 on the day the contract was signed, \$100 or more on the first day of each month until May, 1948, and \$200 or more each month beginning June 1, 1948. The purchasers made six payments aggregating \$700. After the first payment of \$200 they made payments of \$100 on each of the following dates: June 15, 1947, July 3, 1947, February 10, 1948, April 6, 1948 and September 18, 1948. In the fall of 1950 the contract was forfeited and defendant repossessed the premises. At the time of the sale the property was improved with an old frame residential building containing a first floor apartment heated by a furnace in the basement and a second floor apartment heated by an oil stove. At that time the building was occupied by two families. Each tenant furnished his own heat and paid \$12 per month rent. To the rear of the frame building stood a two floor unoccupied cement block garage. After the purchasers took possession they started construction of a concrete block building on the front of the lot.

Plaintiff is a plumbing and heating contractor. In July, 1949, following a telephone call by Julius Blakely, plaintiff went to the premises. Blakely showed him what he wanted done and on July 29, 1949, he and the plaintiff made a contract under which the latter agreed to repair faulty plumbing, install a water pipe, a gas main and risers for nine kitchenette apartments on a "cost plus" basis. Employees of the plaintiff worked on the premises

for eight days commencing August 1, 1949, and ending August 10, 1949, (except Saturday and Sunday) or a total of 124 hours. The charge for labor was \$558 and for material \$185.55. A charge of \$74.35 for insurance, overhead and operating expenses was disallowed by the master. The work done by plaintiff was on the residential frame building.

Plaintiff had no contract with defendant. His contract was with the purchasers. Plaintiff seeks to maintain a lien under Section 1 of the Mechanic's Lien Act on the basis that defendant "authorized or knowingly permitted" the purchasers to contract for the improvements, or that he "consented" thereto. Plaintiff calls attention to a provision of the contract between defendant and the purchasers wherein the latter agreed to keep the building in good repair and neither to suffer or commit any waste thereon. That provision did not authorize the work performed by plaintiff. The question of whether defendant "knowingly permitted" the work to be done on the premises is one of fact. From a careful reading of the transcript of the testimony we do not find any evidence that defendant authorized or knowingly permitted the work to be done. It is significant that after plaintiff's men had worked for eight days in putting in gas pipes and connections, plaintiff refused to go ahead with the plumbing called for under his contract without the assurance of a bank loan. He directed the purchasers to a bank. An employee of the bank contacted defendant, who refused to approve a loan against the property.

As there is no basis in the testimony or exhibits for the finding that defendant knowingly permitted the work to be done, the decree of the Circuit Court of Cook County is reversed and the cause is remanded with directions to dismiss the complaint for want of equity.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, P. J., and NIEMEYER, J., Concur.

45895

WILLIAM KAPLAN,
Appellant,
v.
FRANK J. BIRK, et al.,
Appellees.

349 I.A. 538¹
APPEAL FROM
CIRCUIT COURT
COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendants in his action for real estate broker's commission of \$3,500 on the sale of property at the northeast corner of Erie and Green Streets, Chicago. The original defendants were Frank J. Birk and his two sisters, individually and as the trustees of the Jacob Birk Realty Trust, owners of the property. Prior to the trial Frank J. Birk died and the executor of his last will and testament and a successor trustee were substituted as defendants for the decedent, individually and as trustee.

The evidence is without substantial contradiction on material matters. Plaintiff is and has been a licensed real estate broker for a number of years. Prior to the present controversy he had procured tenants for space in various industrial buildings owned by the trustees. The Green street property was listed with him in 1944 at a price of \$60,000. On April 7, 1945 the selling price was increased to \$70,000 net to the owner. In June 1945 Milten, a licensed real estate broker in plaintiff's employ, showed the property to Mr. Drezmal, an employee and stockholder in Joseph T. Shuflitowski & Co., a corporation. June 13, 1945, Milten advised the defendant Frank Birk, the managing trustee,

that he had exhibited the property to Drezmal and quoted a price of \$70,000. The following day Birk wrote plaintiff, acknowledging the letter of June 13, 1945 and stating, "we will protect your interests with respect to Mr. Drezmal *** in re the sale of the building at Erie & Green Sts.," and calling attention to the fact that by letter of April 7, 1945 the trustees had fixed the sale price of the building at \$70,000 net to the trustees. On receipt of this letter Milten advised Shuflitowski that a mistake had been made in the price quoted and that the commission, \$3,500, should be added to the \$70,000 purchase price. After inspection of the building Shuflitowski advised Milten that the loading facilities of the building were not quite to his liking. Drezmal again inspected the building with Milten, who had suggested certain changes for increasing the loading capacity. After several telephone conversations Shuflitowski advised Milten in August that his company could not use the property and that he was no longer interested in it. Nothing further was done by plaintiff to induce Shuflitowski to purchase the property. October 9, 1945 Milten advised defendants that he was negotiating with the Expert Lamps, Inc., for the sale of the property and had quoted a price of \$75,000. Plaintiff was immediately informed that the property had been sold and a contract signed. October 3, 1945 Shuflitowski signed a contract for the purchase of the property for \$70,000. He did this on the recommendation of Albert J. Gorny, a licensed real estate operator and a long-time friend. The transaction

was completed and conveyance made in November. Defendants paid no brokerage commission. Gorny executed a written disclaimer of all rights to a commission.

Shuflitowski and his corporation were dealers in bakery supplies. For years the business had been conducted in premises on Carroll avenue, purchased in 1926 through Gorny. In the early part of 1945 Shuflitowski was looking for larger quarters. Gorny showed him the Green street property and at least one other property belonging to defendants. Among the properties shown by Gorny was one on Morgan street. Shuflitowski was interested in this property but questioned the price asked. A Chicago Real Estate Board appraisal was had showing the premises to be worth fifteen to eighteen thousand dollars less than the price at which it was offered. Gorny had recommended the purchase of the Green street property but Shuflitowski was not interested because of what he considered inadequate loading space and his doubt as to his ability to finance the purchase. In the appraisal of the Morgan street property Shuflitowski met plaintiff, who, as above stated, exhibited the Green street property to him. After Shuflitowski had advised Milten that he, Shuflitowski, was no longer interested in the Green street property, Gorny again urged upon Shuflitowski the purchase of the property and promised to sell the Carroll avenue property. Gorny sold it in the first half of 1946 and received full brokerage commissions for his services. Shuflitowski also paid him \$1,000 or \$1,100 for his services in acquiring the Green street



property. This was far below the regular real estate commission and is at one time referred to by Shuflitowski as a gift.

Ernst Maysack, aged 79 years and a former employee of defendants, contradicts the testimony of Shuflitowski and Gorny that he showed them the Green street property in the early part of 1945. He testified that he never saw either of them until after the property was sold. He was admittedly hostile to the defendants, stating that he felt pretty sore because he had filled the building with tenants, etc., and "didn't get a dime." It is immaterial whether the property was first exhibited to Shuflitowski by Gorny or plaintiff. The controlling fact is, Who was the moving agent in effecting the sale?

It is apparent that plaintiff accepted Shuflitowski's telephone conversation in August as a final rejection of the property and discontinued all efforts to sell the property to him. The sale was completed through the efforts of Gorny, at a price which defendants had insisted should be net to them. Gorny looked to Shuflitowski and not to defendants for compensation. Plaintiff's "interest with respect to Mr. Drezmal" vanished when Shuflitowski rejected the property in August. He is not entitled to any commission. Weisjohn v. Bell, 316 Ill. App. 62; Drobnick v. Old Line Life Ins. Co., 320 Ill. App. 232; Chicago Title & Trust Co. v. Guild, 323 Ill. App. 608.

The judgment is affirmed.

AFFIRMED.

FRIEND, P. J., and BURKE, J., Concur.

45935

VIVIAN NORMAN,
Appellee,
v.
THOMAS NORMAN,
Appellant.

)
) APPEAL FROM
) SUPERIOR COURT
) COOK COUNTY
)

349 I.A. 338²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant in a divorce action appeals from an amended and supplementary decree fixing the property rights of the parties in which the court found that during their marriage they had by their joint efforts accumulated assets, as follows: Household furniture and furnishings of the fair and reasonable value of \$1500; beneficial interests in Parkway Garden Homes, Trust No. 4130-01, of the reasonable value of \$1300; and \$3200 invested as paid-up premiums in a certain government insurance policy, No. V-714-11-46, same being a Veterans insurance policy upon the life of the defendant. The decree ordered, adjudged and decreed that the household furniture and furnishings be awarded to plaintiff; that plaintiff execute a release and waiver of any and all claim to any beneficial interest in the Parkway Garden Homes, Trust No. 4130-01, and that defendant pay to plaintiff, "not as alimony, but as a lump sum settlement of the property rights of the parties, the whole sum of \$1500," and that, upon compliance with the decree by the payment of said sum, "the permanent injunction restraining the defendant from changing the beneficiary on the insurance policy above described shall be modified so as to permit the change of said beneficiary." This decree was endorsed "Approved" and signed by the attorneys for both parties.

Defendant urges that the court was without jurisdiction to enter any orders in respect to the insurance policy, on the ground that jurisdiction in respect to the policy is vested only in the federal courts. Plaintiff contests this contention of defendant and insists that the decree under consideration, being a consent decree, cannot be appealed from. In his reply brief defendant's counsel say, "*** we would be unable by consent or any other means (to) confer jurisdiction upon the court if the act in question withhold such jurisdiction or did not confer it. A consent decree where a question of jurisdiction is raised does not fall within the general rule denying appeal from consent decrees." No authority is cited to support this contention. The decree before us is a consent decree. Chicago etc. Benevolent Soc. v. Chicago etc. Aid Soc., 283 Ill. 99. In respect to such decrees the court in Sims v. Powell, 390 Ill. 610 at page 617, said:

"The law is firmly established that where parties who are competent to contract agree to the rendition of a judgment or decree with respect to any subject which may be the subject of litigation, the final order, when entered, is by consent. Moreover, a consent decree is not a judicial determination of the rights of the parties as it does not purport to represent the judgment of the court but merely records the agreement of the parties. A decree so entered by consent cannot be reviewed by appeal or writ of error and can only be set aside by an original bill of review. (Bergman v. Rhodes, 334 Ill. 137; Mooney v. Valentynovitch, 262 Ill. 355; Galway v. Galway, 231 Ill. 217; Krieger v. Krieger, 221 Ill. 479.)"

Defendant has misconceived his remedy.

The appeal is dismissed.

APPEAL DISMISSED.

FRIEND, P. J., and BURKE, J., Concur.

157

A

45881

PHILIP P. WEINBERG and HERMAN
N. STUTZ, co-partners, doing
business as HARRY L. MICHAELS
ASSOCIATES,

Appellees,

v.

HAREWOOD POTTERY CORPORATION,
a corporation,

Appellant.

349 I.A. 539¹

APPEAL FROM

MUNICIPAL COURT

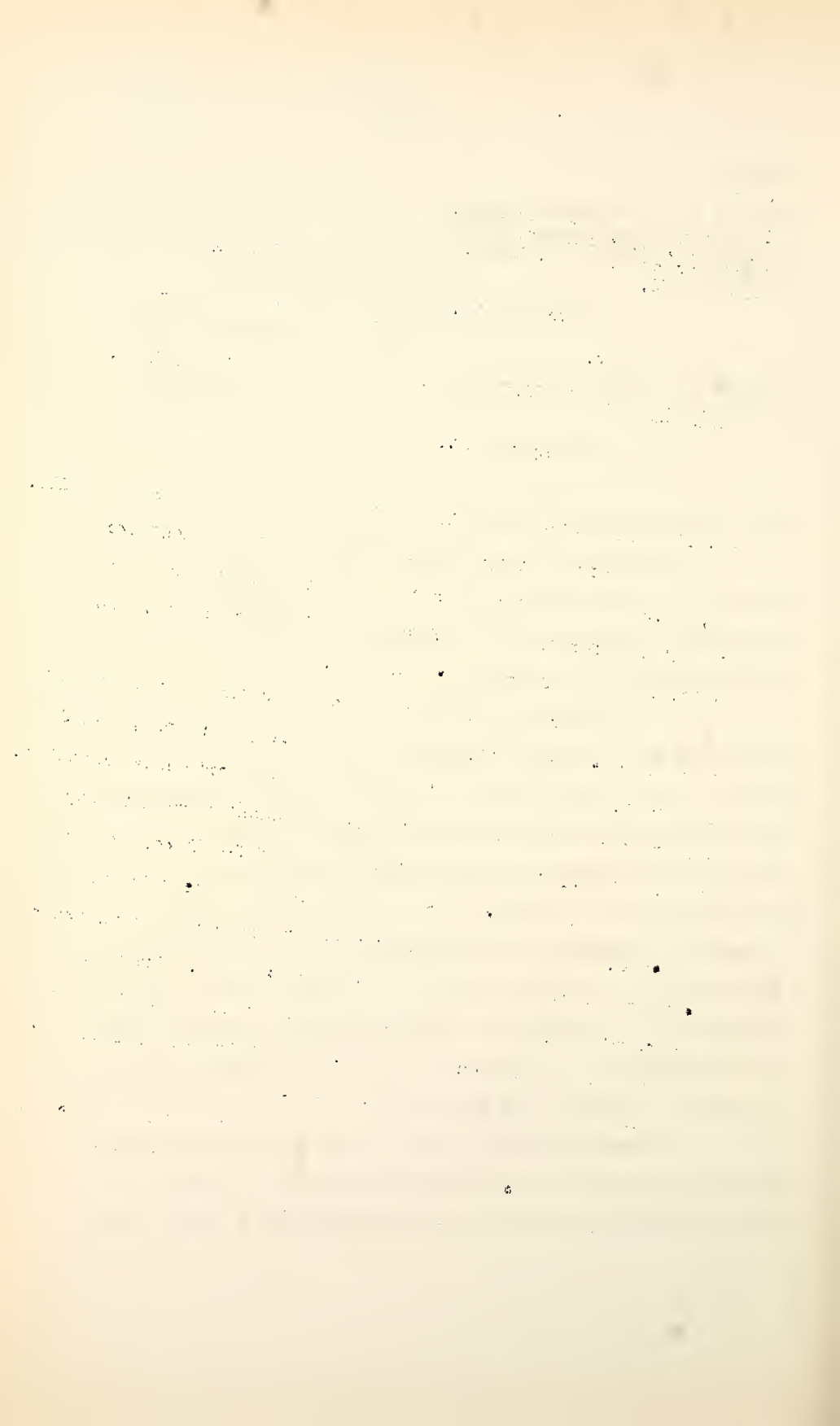
OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a summary judgment for \$1,871.26 in an action for commissions alleged to be due plaintiffs for the sale of defendant's merchandise. No brief has been filed by plaintiffs.

The statement of claim alleges that the defendant agreed to pay plaintiffs commissions of 5 per cent, 7-1/2 per cent, and 10 per cent on the sale of certain merchandise, and that in addition thereto the defendant agreed to pay plaintiffs an "overriding commission of 2-1/2 per cent and also a bonus of 1 per cent on all merchandise sold and shipped." Attached to the statement of claim is an exhibit purporting to show the names of the persons, firms and corporations, the amount of merchandise sold and the amount of commission due on each sale. The total of commissions claimed by plaintiffs is \$2,494.10.

Defendant filed a defense denying that any person in the employ of defendant had the authority to enter into a contract with plaintiffs for the payment of a bonus in the

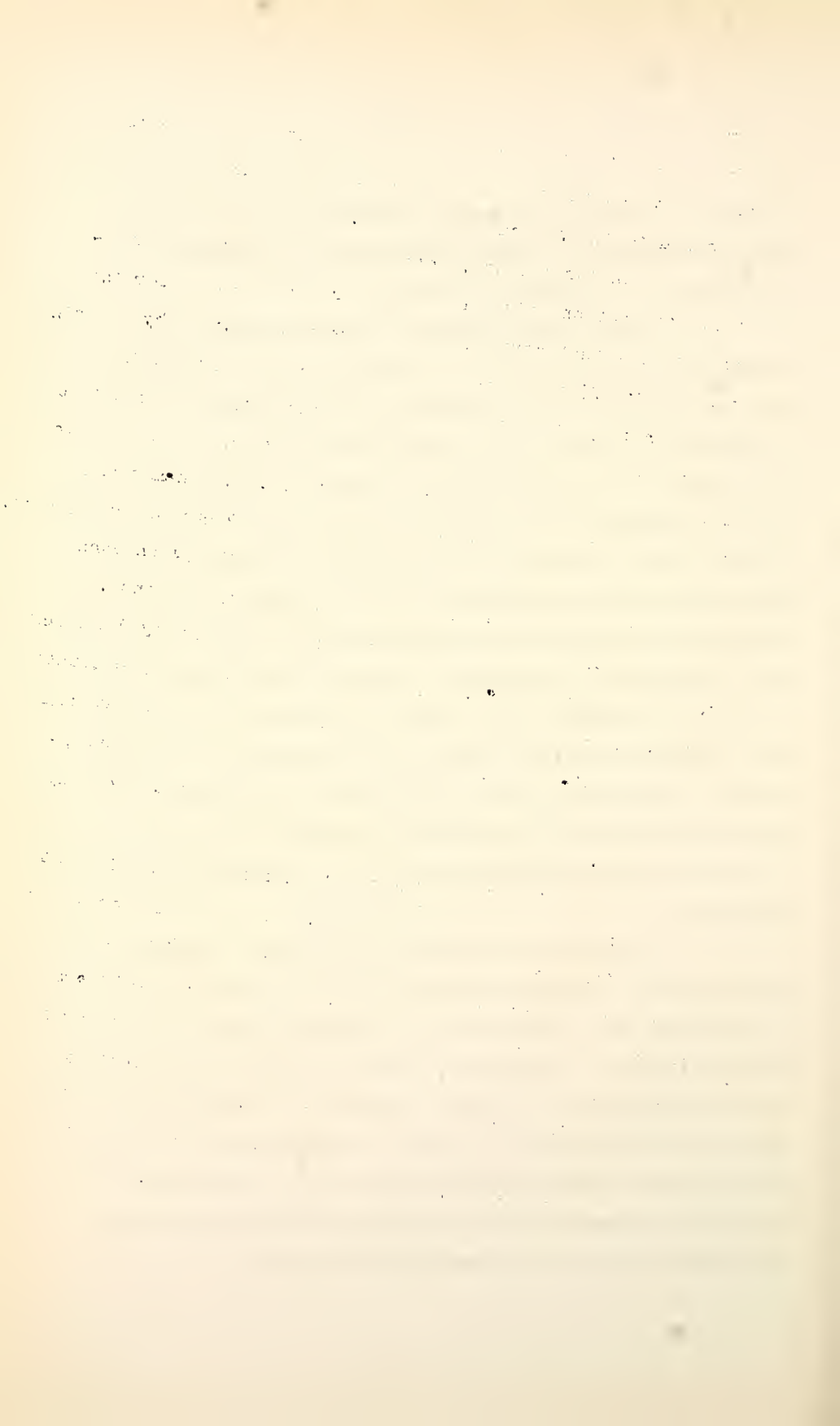


amount of 1 per cent and denying that the plaintiffs sold and delivered all the merchandise shown in the exhibit attached to the statement of claim.

In its defense, defendant avers that the plaintiffs are not entitled to the commissions claimed for the reasons (1) that certain merchandise was returned by certain customers; (2) that certain orders were canceled by the customers; (3) that the defendant refused to give credit to certain customers; and (4) that defendant failed to receive certain orders claimed by the plaintiffs. The names and addresses of the customers falling in the foregoing categories, including the reduced commissions due plaintiffs on each sale, are shown in an exhibit attached to the defense.

The defense also shows an overpayment by defendant to plaintiffs of \$395.70 for which defendant filed a counterclaim. A reply was filed by plaintiffs to the defense and to the counterclaim, denying that there had been an overpayment to counterdefendants in the sum of \$395.70 or any other sum.

In support of their motion for summary judgment plaintiffs filed three affidavits. These affidavits state in substance that plaintiffs and one Jerome Kaplan, the former president of defendant, made oral agreements providing for the commissions to be paid plaintiffs on the sale of defendant's merchandise as alleged in the statement of claim, including the "overriding commission" and the additional bonus of 1 per cent on all the merchandise sold and shipped by defendant into certain designated territory.



In a counteraffidavit filed by Richard G. Dunn, president of defendant corporation when this suit was instituted, he asserted that Kaplan defaulted with funds and assets of defendant; that Kaplan was ousted from his position as director, shareholder and employee of defendant; and that Kaplan because of his expulsion is antagonistic toward defendant and is attempting to hinder its operation. In this affidavit Dunn denies that he negotiated with plaintiffs in 1949 by long distance telephone for the sale of defendant's merchandise as related in plaintiffs' affidavits and states that the first time he received knowledge of plaintiffs' claim for a 1 per cent bonus was after Kaplan was ousted; that defendant has no records of statements or communications received from plaintiffs with reference to the 1 per cent bonus, nor did plaintiffs make any claim for the 1 per cent bonus from defendant during the years 1949, 1950 and 1951 prior to the time Kaplan was expelled.

One of the items in controversy is represented by checks issued by Kaplan, acting in behalf of defendant, to the wives of plaintiffs for the sum of \$1,617.11 which plaintiffs say was in payment of a bonus of 1 per cent on the amount of orders taken by plaintiffs and shipped by defendant in the year 1950. So far as the pleadings and affidavits show, plaintiffs' wives were never employed by defendant and had no other business transactions with it. In its defense defendant avers that the payment of the \$1,617.11 should be credited to defendant in payment of commissions earned by plaintiffs exclusive of the 1 per cent bonus, it being the theory of the defendant that there never was any arrangement for the payment of a 1 per cent bonus to plaintiffs.

THE HISTORY OF

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
JOHN B. BOWEN
OF THE BOSTON BAR

BOSTON
PUBLISHED BY
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1845

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1845

We have read the pleadings and the affidavits and are of the opinion that they present issues of fact as to whether there was an oral agreement relating to the payment of a 1 per cent bonus; also the question of the application of the checks paid to plaintiffs' wives and the excess payment as alleged in defendant's counterclaim.

The purpose of a summary judgment proceeding is to determine whether a defense exists. In the recent case of Zegarski v. Ashland Savings Bank and Loan Association, 346 Ill. App. 535, this court said, at page 540:

"Where a defense raising an issue of fact as to plaintiff's right to recover is set up, a summary judgment must be denied. To try an issue of fact by affidavits would deprive defendant of his right to a jury trial. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523; Barkhausen v. Naugher, 395 Ill. 562; Macks v. Macks, 329 Ill. App. 144; Searle & Funderburg, Inc. v. Fuhremann Canning Co., 340 Ill. App. 643."

To the same effect see Rowan et al. v. Matanky et al., 108 NE2d 799.

Since we think there are triable issues presented we are impelled to reverse the judgment.

For the reasons stated, the judgment is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

FEINBERG AND KILEY, JJ. CONCUR.

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45799

CHICAGO MACARONI COMPANY, a
corporation,

Appellant,

v.

JOHN GROSSI and WILLIAM GROSSI,
doing business as GROSSI BROTHERS,

Appellees.

3491.A.539²
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action for the balance alleged to be due it on account of the sale and delivery to defendants of 1,000 cases of tomato paste.

Plaintiff's complaint alleges that on or about September 24, 1946, the Office of Price Administration was in full force and effect, and the commissioners were holding hearings upon the price to be placed upon tomato paste and similar products, which prices had not at that time been set or ascertained; that plaintiff had the tomato paste in storage, and defendants were desirous of purchasing same but were informed by plaintiff that the same could not be released, as no price had been set; that upon defendants' request, plaintiff delivered to defendants, at their place of business, 1,000 cases of tomato paste to be stored by defendants, so as to assure them that they would receive a sufficient amount of plaintiff's supply; that defendants agreed to hold same until plaintiff was in a position to quote a price and sell same to defendants; that defendants deposited with plaintiff the sum of \$8250 as evidence of

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| Condition | Control (n=10) | MCI (n=10) | AD (n=10) |
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| D | 85 | 65 | 45 |

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good faith, with the understanding that when the price was ascertained said sum could be applied on any future sale of said merchandise to them or the paste returned to plaintiff; that on or about October 16, 1946, all tomato paste was de-controlled by presidential order and the Office of Price Administration abolished; that thereafter plaintiff sold to defendants said tomato paste, so delivered to defendants for storage, and rendered invoices totalling \$11,800; and that giving credit to defendants for the deposit made left a balance due of \$3550, for which plaintiff claimed judgment.

An answer was filed, together with a counterclaim, in which defendants allege that the amount paid plaintiff--namely, \$8250--was in excess of the maximum price for the product allowed by the regulations under the Federal Price Control Act, the excess being \$990; that under the Price Control Act plaintiff became liable to defendants for treble damages amounting to \$2970, in addition to the sum of \$750 for attorney's fees sought to be recovered under the counterclaim. Defendants deny that plaintiff delivered the 1,000 cases of tomato paste under any agreement with defendants to hold the same in storage until the maximum price was fixed by the Price Administrator, but on the contrary allege that it was a sale of said tomato paste to defendants and delivery made at the prices invoiced to defendants, which amount, as invoiced, was in excess of the then existing maximum price fixed by the Price Administrator. As already noted, by their counterclaim defendants sought to recover the treble damages for the excess.

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The answer to the counterclaim denied any violation of the maximum price regulation for said product.

Upon the issues raised by the pleadings and evidence heard, the court directed a verdict for the defendants as to plaintiff's claim and submitted the cause to the jury upon the counterclaim and answer thereto. The jury returned a verdict against the counterclaimants and in favor of counter-defendant. After motions for new trial and judgment notwithstanding the verdict made by counterclaimants, the court entered judgment upon the verdict, from which counterclaimants appeal. Plaintiff appeals from the judgment entered upon the verdict directed by the court.

Counterclaimants contend that the verdict of the jury upon their counterclaim is against the manifest weight of the evidence. There was a conflict in the evidence as to terms of the agreement between the parties with respect to the delivery of the 1,000 cases of tomato paste. The issue was whether there was a sale at the time of the delivery. There was evidence tending to support the conflicting versions of the parties as to the agreement, and we cannot say upon a review of the evidence that the verdict is against the manifest weight of the evidence. It was strictly the province of the jury to pass upon the facts, and the jury chose to believe plaintiff's version of the agreement. Upon the state of the evidence, the court was justified in sustaining the verdict.

As to plaintiff's claim, we think the court erred in directing a verdict for defendants. Plaintiff made out a prima facie case. There was a conflict in the evidence, and under the circumstances the court has no right to direct a verdict. The rule has been repeatedly stated that where there is any evidence, together with all favorable inferences therefrom, tending to support plaintiff's claim, the court is not justified in directing a verdict against plaintiff. Minters v. Mid-City Management Corp., 331 Ill. App. 64, 71; Norkevich v. Atchinson, Topeka & Santa Fe Ry. Co., 263 Ill. App. 1, 4 (certiorari denied by the Supreme Court), and cases there cited.

It is suggested that if, upon a retrial as to plaintiff's claim, there should be a verdict for the defendants, it would be inconsistent with the verdict for plaintiff rendered upon defendants' counterclaim. The jury having rendered a verdict against defendants upon their counterclaim, it is an adjudication that there was no sale of the tomato paste at the time of the delivery. The only basis upon which defendants could have recovered upon their counterclaim was that there was a sale at the time of the delivery. That issue is no longer in the case.

We cannot agree that a verdict for the defendants upon a retrial as to plaintiff's claim would be inconsistent with the jury's verdict on the defendants' counterclaim, in view of the allegations in plaintiff's complaint. It is there alleged that there was a delivery of 1,000 cases of tomato paste to defendants without a price being agreed upon,

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and that the Office of Price Administration was abolished October 16, 1946. The measure of recovery under the Uniform Sales Act (Ill. Rev. Stat. 1951, Ch. 121-1/2, §9 (4)) would be the reasonable price. That section provides:

"What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

Dependent upon what evidence may be offered upon another trial, the jury might determine that the amount paid by defendants--namely, \$8250-- was a reasonable price, or more than a reasonable price, to pay for the tomato paste delivered, and hence there could be a verdict for the defendants upon plaintiff's claim. Whether a verdict for the plaintiff upon such evidence would be inconsistent with the verdict on the counterclaim is not before us, and we do not express any opinion upon that question.

The judgment upon the counterclaim is affirmed. The judgment as to plaintiff's claim is reversed, and the cause is remanded for a new trial.

AFFIRMED IN PART AND
REVERSED IN PART AND
REMANDED.

LEWE, P.J. AND KILEY, J., CONCUR.

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45940

LASH AND MAGES, INC.,

Plaintiff - Appellee and
cross - Appellant,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, a corporation,

Defendant - Appellant and
Cross - Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

349 I.A. 540

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for alleged breach of duty by the defendant in transporting a shipment of plums from California to Chicago. The court without a jury found, and entered judgment, for plaintiff for \$1796.15. Defendant has appealed. Plaintiff's cross-appeal was not prosecuted here.

Both parties were engaged in interstate commerce. On May 22, 1947, there was delivered to the defendant's connecting carrier at Wasco, California 1055 crates of Beauty plums, consigned to Federal Fruit Distributors, Chicago, Illinois. A United States Department of Agriculture inspection, made at that time, showed the plums were in good condition, free from decay. En route the shipment was re-consigned to plaintiff, a merchandiser of fruits and vegetables in Chicago. Defendant was the terminal carrier. The shipment arrived in Chicago May 29th. An inspection at Chicago, by a private agency, disclosed a substantial spoilage of the plums. Plaintiff sold the plums for the best price obtainable,

and the judgment represents the difference between the sale price and the price which the plums unspoiled would have brought at the market.

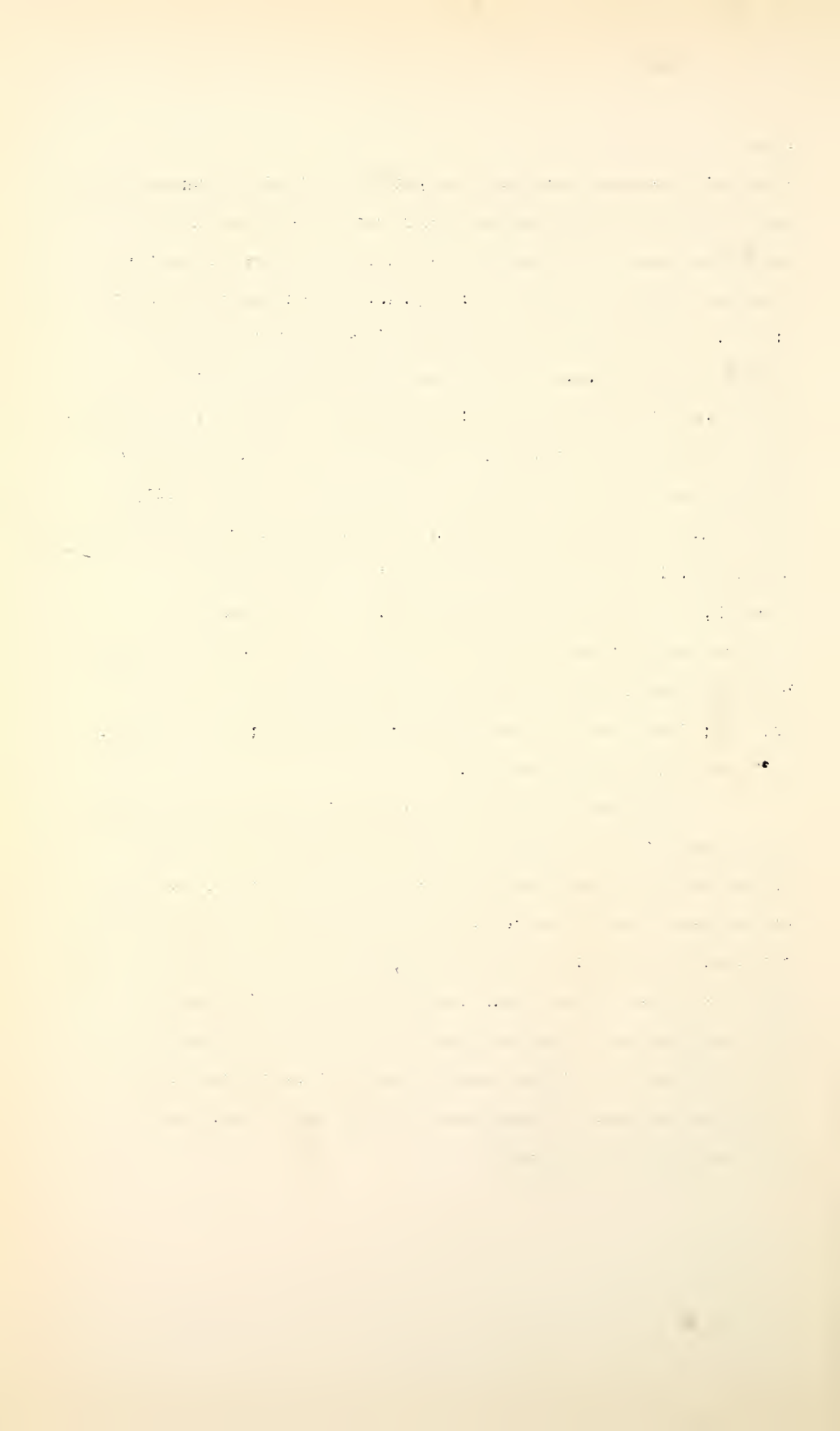
The parties agree that plaintiff, to establish a prima facie case, had the burden of proving that the perishable goods were delivered to the carrier in good condition and that they were received at the delivery point in bad condition. Plaintiff made this proof. The parties agree also that where a plaintiff has made out a prima facie case of this kind, the carrier has the burden of showing due care and diligence, consistent with the nature of the goods being shipped. They agree too, that where a carrier undertakes to transport perishable freight, it is liable for injury to the commodity caused by a defect in the car furnished by the carrier.

In this court, the dispute is about whether a carrier is, or is not, an insurer of perishable goods. Since the parties agree that once the plaintiff establishes a prima facie case the carrier, whether an insurer or not, has the burden of showing due care, we see no necessity of resolving the dispute. The only question for us to decide is whether the finding of the trial court, that the defendant did not exercise due care, or that it furnished defective equipment for the transportation of the plums, is against the manifest weight of the evidence.

The bill of lading called for "STANDARD REFRIGERATION, fan car, keep fans in position to destination." The

carrier's records show that car #4225 was iced at Bakersfield, May 20th with 11,500 pounds. This was called for in the shipping order. The car was then moved to Wasco where the loading began, May 21st at 1:30 p.m., and ended May 22nd at 4:30 p.m., which was followed by a "precooling" service ending at 11:59 p.m. The car was re-iced May 23rd at Bakersfield with 7800 pounds; May 24th, at Needles, California, with 3000 pounds; May 24th, at Winslow, Arizona, with 2700 pounds; May 25th, at Belen, New Mexico, with 1800 pounds; May 26th, at Waynoka, Oklahoma, with 3000 pounds; May 27th, at Argentine, Kansas, with 3000 pounds; and May 28th, at Corwith, Illinois, with 3400 pounds. The maximum and minimum temperature outside the car at these re-icing stops, beginning May 23rd at Bakersfield were respectively: 98° and 64°; 104° and 76°; 84° and 52°; 90° and 56°; 87° and 58°; 79° and 58°; and 54° and 43°.

An expert witness for plaintiff testified, in answer to a hypothetical question, that the amount of ice with which car #4225 was re-iced en route was abnormal, and that an abnormal use of ice could have been made necessary by a car door opening of 5 inches long, and in some places 1/8 and in others 1 inch wide. Another expert testified that the temperature in the car upon inspection in Chicago was "51° top and 44° bottom" whereas normal temperature in a refrigerated car, in good shape and properly iced, was "44° top and 40° bottom."



Plaintiff's inspector, upon arrival in Chicago, testified he found an opening at the top of the "north door ...5 to 6 inches long" and on the south door "about 3 or 4 inches long." This would tend to increase the temperature. On the other hand, defendant's expert examined car #4225 on May 31st and found the door "fitted tightly and properly closed." There was testimony to indicate that defendant's expert had more technical competency than plaintiff's expert in the examination of railway equipment. There was evidence however of extended experience on the part of the plaintiff's inspector; and furthermore, the alleged defect was not a technical matter.

The theory of the defense was that defendant properly performed its function and that plaintiff should have requested that salt be used to aid in the ice refrigeration. The implication was that the plums required salt for safe transportation. This theory was met by testimony for the plaintiff that this shipment of plums was the first of the season and that salt is not normally required until after several days of shipping.

We see no reason for setting aside the finding of the trial judge, and for that reason the judgment is affirmed.

AFFIRMED.

LEWE, P.J. AND FEINBERG, J. CONCUR.

RESERVE BOOK

Illinois Unpublished Opinions

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78693

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| 11-1-22 | W. L. L. L. | 372-2000 |
| 11-27-22 | J. L. L. L. | ST 2-3751 |
| 9-12-22 | R. L. L. L. | CE 6-1234 |
| 12-27 | M. L. L. L. | 729-4777 |
| 10-1-2 | J. L. L. L. | 746-5750 |
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